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Chinese Foreign Trade Agency Law: a Critical Analysis and a Proposal for Reforms

By

Hua Wei

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of **Master of Laws**.

Faculty of Law

Edmonton, Alberta

Fall, 2003

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Date Submitted to FGSR: June 3, 2003

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Faculty of Graduate Studies and Research

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled ***Chinese Foreign Trade Agency Law: a Critical Analysis and a Proposal for Reforms*** submitted by **Hua Wei** in partial fulfillment of the requirements for the degree of **Master of Laws**.

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ABSTRACT

The tremendous development of China's foreign trade since the implementation of an "open door" policy two decades ago has become one of the main motivating forces for reforms of its undeveloped foreign trade law.

This thesis focuses on Chinese foreign trade agency law, which is fractionated into several distinct legal sources and has not yet been systematically examined by Chinese legislative bodies. Basing on analysis of the current Chinese foreign trade agency system and Chinese foreign trade agency law, the author aims to point out the major problems affecting this legal regime and furthermore, to contribute approaches to future reforms of Chinese foreign trade agency law.

This thesis is dedicated to –

my family, and my endurable mother country – *China*.

Acknowledgements

There are a number of people who contributed in various ways to this research work. First of all, I give my sincerest thanks to my family, that is, my caring parents, encouraging siblings and my lovely niece. Although they are on the other side of the Pacific Ocean, their love is the spiritual support for my pursuant of a post-graduate program in a foreign country.

I am indebted to my supervisor, Professor Michael Pratt, who spent considerable time from his over-occupied work schedule on my thesis and always generously gave me his insightful opinions and encouragement, which are extraordinarily helpful for my progress. Thanks also go to Professor Shannon O'Byrne and Professor Rolf Mirus to be members of my defense committee.

I will like to thank my friends in Shanghai, including CHEN Xia and XIE Junhui, for their kind help in collecting materials for my research. Thanks to my dear colleagues and staff members of John Weir Law Library, in particular Ina and Hsaio-ku. Finally, I appreciate the editing work by Patricia Heffernan, Adam and John Doyle.

Financial support has been munificently provided during my graduate studies from Faculty of Law, University of Alberta.

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ABBREVIATION GUIDE

CCP	CHINESE COMMUNIST PARTY
FTL	FOREIGN TRADE LAW
GPCL	GENERAL PRINCIPLES OF CIVIL LAW
IPFTAS	INTERIM PROVISIONS OF FOREIGN TRADE AGENCY SYSTEM
MOFTEC	MINISTRY OF FOREIGN TRADE AND ECONOMIC COOPERATION
MOFERT	MINISTRY OF FOREIGN ECONOMIC RELATIONS AND TRADE
NPC	NATIONAL PEOPLE'S CONGRESS
PRC	PEOPLE'S REPUBLIC OF CHINA
WTO	WORLD TRADE ORGANIZATION

CHAPTER 1

AN OVERVIEW OF THE CHINESE LEGAL SYSTEM

Introduction:

As a foundation for the thesis, Chapter 1 is designed to give a brief overview of the Chinese legal system before delving into concrete legal provisions. No legal system can be analyzed without some understanding of its cultural background, especially in China, a country with a long history of civilization. Therefore, legal traditions in China, notably Legalism and Confucianism as two representative schools of thought, will first be introduced.

The modernization of Chinese law began during the Qing dynasty in the late 19th century and continued until the Guomindang era at the beginning of the 20th century. However, the legal reform and construction that essentially changed China and constituted the sustaining Chinese legal system commenced after 1949 when the People's Republic of China was founded, particularly after the end of the Cultural Revolution in 1978.

Currently, a socialist legal system is being established with its legal structure well set in the Chinese Constitution. The principle of the rule of law, contrary to the Chinese traditional concept – rule of man, has been widely accepted theoretically throughout the country. Of course, in spite of the great achievements in the past two decades, there remain many ideological and practical restraints to further legal development in China.

1.1 Legal Traditions of Chinese Law

As stated in the Preamble to the Chinese Constitution, "China is a country with one of the longest histories in the world".[1] With two and a half millennia of development, the Chinese people have accumulated an impressive cultural heritage. However, with respect to its legal ideology, China is always considered "a story of notable absence of governance by law".[2] Most legal works refer to Confucianism to explain why China is not a law-oriented country.[3] Nevertheless, the effect of other thoughts on Chinese legal development should not be disregarded or underestimated, including Legalism, which once occupied a relatively premium status in China for a short period, and strongly influenced the development of Chinese law.

- ***Legalism***

Legalism was founded before the Qin dynasty (221-206 B.C.), when there were several separate states scattered in China continuously fighting against each other to unite China by conquering the others. This unstable situation did not restrain but accelerated the formation of many important schools of thought.[4] Legalism was one of

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1The English text of Chinese Constitution, See online <http://product.chinawe.com/cgi-bin/lawdetail.pl?LawID=114> (Date accessed: September 3, 2002).

[2]Poh-Ling Tan, ed., *Asian Legal Systems* (Sydney: Butterworths, 1997) at 14.

[3]See *ibid.* Yan Wang, *Chinese Legal Reform* (London: Routledge, 2002) at 20. Albert HY Chen, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Butterworths, 1993) at 8-11.

4 It was called "several masters and one hundred schools"(*zhuzi baijia*) which reflected how active and prosperous the culture was during that period.

them.[5] It originated in the Chunqiu Time (770- 403 B.C.), took shape in the beginning of the Zhanguo Time (403- 221 B.C.) and became active during the remaining period of the Zhanguo Time.

Legalism was a legal philosophy attributed to a number of people who had similar ideas, such as Han Feizi, Shang Yang, Guan Zhong and Li Si. Their thoughts appear in several books, of which the most important is *Han Fiezi* consisting of 55 chapters. The core idea of Legalism is that in view of humankind's inherent traits, such as being self-interested, profit-seeking, calculating, pain-averse and risk-averse,[6] the ruler should utilize law as the supreme tool for its sovereignty instead of ethics or cultural influence.[7] Legalism held that having a sage was very helpful for the ruler to ensure his domination. However, it further recognized the unavailability of enough sages in reality, and based on that, it firmly held that law had to be made to help keep the state machine going and protect the social hierarchy.[8] In *Han Feizi*, order as opposed to chaos is repeatedly emphasized.[9] To obtain order, according to the view of Legalism, rule of law was the clearest mechanism.[10] More specifically, "rewards should be rich and certain so that the

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[5]Other schools of thought include Confucianism, Taoism, Yiyangism, Mohism etc.

6 However, Han Feizi did not assume that human beings are of evil nature. Instead, he believed that human can be good or bad, depending on circumstances. See Suliman Osman, ed., *China's Transition to a Socialist Market Economy* (London: Quorum Books, 1998) at 174.

[7]See <http://hk.geocities.com/kogdc/fat.htm> (Date accessed: September 15, 2002).

[8]*Ibid.*

9See Kirsten, *supra* note 6 at 172.

10 *Ibid.*

people will be attracted by them; punishments should be severe and definite so that the people will fear them; and laws should be uniform and steadfast so that the people will be familiar with them."[11] Some advocates of Legalism even asserted that a bad law was better than none.

Legalism was prominent in the Qin dynasty.[12] The emperor Qin Shi Huang believed in this theory and implemented it for ruling the country. After the union of China in 221 B.C., Qin Shi Huang wanted to control people's thoughts, in addition to Chinese politics and economy, through harsh law and stern punishment. In 213 B.C., he adopted the suggestion of Li Si, one of the Legalism masters and then premier, that he should destroy the opposing thoughts including Confucianism by burning all the related books. The next year, the tragedy of pitting the Confucians ensued.[13] However, by these brutal means, Qin Shi Huang's cruel domination was not strengthened, but, contrarily, he lost the support of the people. Scholars and peasants called for rebellion even more frequently and severely than they had before. After merely fifteen years of sovereign rule, the Qin dynasty was overturned. From then on, emperors regarded Legalism as a

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[11]Han Feizi et al., *Han Feizi*, trans. by Wm. Theodore de Bary. See online <http://www.geocities.com/tokyo/Springs/6339/Legalism.html> (Date accessed: September 15, 2002).

[12]In 221 B.C., a state named Qin defeated all the others and united China. The first imperial country was established in Chinese history. The king of the Qin named himself "the first emperor of Qin" (*qin shi huang*). The first imperial country was established in Chinese history.

[13]Because of the events held by Qin Shi Huang, including burning the books containing other thoughts save Legalism and prohibiting the Confucians from establishing private schools, many Confucians became unsatisfied with the Emperor. They criticized him for being a totalitarian ruling the country merely by brutal penalty. Qin Shi Huang realized the challenge to his new polity from these Confucians. To solidify his governance, he decided to get rid of his opponents. In 212 B.C., more than 460 Confucians were killed in the

negative lesson with respect to the rule of a country and gradually Legalism was obscured following its popularity in the Qin dynasty.

Rule of law in Legalism refers to making decisions by the sovereign, along with consistent and thorough application of reward and punishment to shape human behavior in "accordance with the principle of order".[14] Therefore, rule of law in Legalism, which was an instrument employed by feudal rulers to strengthen their central domination and totalitarianism, essentially differed from rule of law in its modern meaning and belongs to the concept of rule of man.

However, compared with other thoughts in ancient China, Legalism occupies an irreplaceable position because it is the only ideology that emphasizes law as the supreme authority with the exception of the paramount ruler of the time. After the end of the Qin dynasty, Legalism was never fully adopted by Chinese rulers. Nevertheless, this theory had a tremendous impact on the autocratic monarchy implemented in the later Chinese feudal period. The most obvious example of the harsh doctrine of Legalism is that severe criminal law was always the backbone to Chinese ancient law and in contrast, civil law was disregarded and undeveloped. Even today, Legalism's pragmatic approach to law is reflected in the similar address from Deng Xiaoping, the later leader of the Chinese Communist Party, regarding the development of law.[15]

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pits close to Xianyang City. These tragedies are named "*fen shu keng ru*" in Chinese history.

14 Kirsten, *supra* note 6 at 173.

15 For instance, shortly after ending the Great Culture Revolution, Deng Xiaoping, the new leader of the CCP, used a metaphor that "a cat which can catch mice is a good cat no matter it is white or black". His address intended to encourage the state to focus on economic development by marginalizing the capitalist

- ***Confucianism***

Confucianism was founded by the well-known Chinese philosopher Confucius, who was born in a noble but poor family in *Lu*[16] in 551 B.C..[17] During the latter part of Confucius's life, he committed to reorganizing previous works from which he established his thoughts and formed primitive Confucianism.[18] At the heart of Confucianism, the principles of "good conduct, practical wisdom and proper social relationships"[19] were provided as follows:

"If people be led by laws, and uniformity be sought to be given to them by punishments, they will try to avoid punishments but have no sense of shame. If they be led by virtue and uniformity is sought to be given them by *li*[20], they will have a sense of shame and, moreover, will become good."[21]

Confucius believed that to instill a sense of right and wrong and to cultivate high-level moral virtues in people was the only sound way for the ruler to rule the state. Furthermore, he insisted that only when the state had virtues (*dao*), could it be well

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character of society setting.

[16]Lu, a state in Chunqiu and Zhanguo Times, is the ancient name for Shandong province in the east of China.

17 Confucius was good at learning from other people, and after 30 years of life, he began his teaching career. He moved from one state to another to teach. He had many disciples including Yanlu, Zilu, Boniu and Yanyuan, who later summarized and enhanced his doctrines. During that time, people used to go to the government schools to study. However, Confucius broke the limitation of hierarchy and accelerated the popularization of education. Although he was successful in publicizing his thoughts, his political ideas were never really adopted by the feudal rulers who ruled during his lifetime. Nonetheless, he never gave up devoting himself to education. Confucius great spirit earned him potent prestige and helped the popularization of Confucianism.

[18]These books are the Four Books (*si shu*) and the Five Classics (*wu jing*).

[19]See online <http://www.connect.net/ron/confucianism.html> (Date accessed: September 3, 2002).

[20]*Li* is interpreted as correct behaviour protecting the social order, involving moral propriety through ritual, rites and norms of propriety.

[21]See Poh-ling Tan, *supra* note 2 at 15.

developed with people's true support, and only after a breakdown of social order did the law apply.[22]

Another important idea of Confucianism is the doctrine of mean *(zhong yong)*, which is deemed as the highest ethic of a man with moral integrity.[23] Therefore, mediation and compromise are the best ways to solve disputes in that they can help parties reestablish "harmony and mutual respect",[24] in contrast to the other methods, such as judicial remedies, which cannot. This idea is still dearly believed by Chinese, including many Chinese businesspeople, who are inclined to implement negotiation and mediation as the dominant mode of dispute resolution.

Confucius believed that people are not born equal and thus their behavioral standards cannot be the same. Once, when a king of a state asked Confucius how to rule a state, he replied, "Kings act as kings, subjects act as subjects, fathers act as fathers and sons act as sons".[25] From his point of view, people are divided into different classes and between each class there is an unsurpassable gap. In the book *Liji-Quli*, law was depicted to be only applicable to humble people. Those with high virtues are supposed to be restricted only by *li* rather than law.[26] Under the influence of Confucianism during

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[22] *Ibid*, chapter 27.

[23] *Ibid*, chapter 2.

[24] See Poh-ling Tan, *supra* note 2 at 16.

[25] See Confucius, *The Analects*, chapter *Yan Yuan*. See online <http://zhongwen.com/zhong.htm> (Date accessed: September 4, 2002).

26 Confucius' disciples later developed ten attitudes that were designed to govern five relationships: love in father and filial piety in the son; gentility in the oldest brother and humility and respect in the younger;

China's long feudal history, it is therefore not surprising to discover the lack of the concept of equality in Chinese legal history.

Confucianism "shaped Chinese administration and the moral and social attitudes of the Chinese people" to a considerable extent.[27] Different from Legalism, the key basis of state rule in Confucianism is exclusively rule by man.[28] In Confucianism, rule by man with virtues is the ideal for a state. Ethics is more important and effective to rule a state and build a good social order than any violence, such as law. Such a conviction has become "the most durable ethical and social edifice[s] in recorded time" in China.[29] However, the idea's essence is to protect the sovereignty of rulers, which is similar to Legalism. In this sense, both Legalism and Confucianism are incompatible with the Western liberal doctrine of rule of law.[30] Their profound effect on Chinese legal development has never faded away. Even when we study the current Chinese law and its development, many ideas can be traced back to Legalism and Confucianism as invisible but important factors.

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righteous behavior in the husband and obedience in the wife; humane consideration in elders and deference in juniors; benevolence in rulers and loyalty in subjects. Fritz G. Cohen, "A synopsis of the Ethics of Confucianism". See online <http://www.sla.purdue.edu/academic/fll/Japanese/JPNS280/projects/Cohen.htm> (Date accessed: September 15, 2002).

[27]Poh-ling Tan, *supra* note 2 at 15.

[28]Confucius, *Doctrine of the Mean*, chapter 20. See online <http://zhongwen.com/zhong.htm> (Date accessed: September 4, 2002).

[29]G.Cohen, *supra* note 26.

[30]See R. M. Unger, *Knowledge & Politics* (New York: Free Press, 1975) at 19.

1.2 Historical Development of Chinese Law

1.2.1 Before 1949: Pre-Socialist Era

After the extinction of the Qin dynasty, there have been a series of dynasties in Chinese feudal history.[31] Since the Han dynasty, Chinese emperors revered Confucianism as the national doctrine (*guo xue*).[32] In contrast, law, regarded as a supplementary tool for ruling, had to be subordinate and did not attract much attention from the feudal rulers. In the ancient Chinese legal system, there was no division of criminal law and civil law, no separation of administrative and judicial authority, and therefore state officials behaved both as prosecutors and as judges. Of course, improvements did occur during China's long history.

In the mid-nineteenth century, the Opium Wars and subsequent unequal treaties with foreign countries triggered legal modernization in China. The Qing dynasty even established a commission to study foreign laws and started codification work in line with Western laws. They mainly borrowed from continental Europe and Japan, while "little attention was given to common law".[33] There are several reasons why Chinese legal scholars preferred the civil law: Firstly, the common law is said to be too unsystematic, too bulky and too scattered. Secondly, the technique of common law is also hard to

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[31] From hierarchy, they are West Han, East Han, Three States (*san guo*), West Jin, East Jin, Southnorth (*nan bei chao*), Tang, Song, Yuan, Ming and Qing.

32 Han Wu Di (157 B.C.–87 B.C.) adopted Dong Zhongshu's advice, i. e., "Confucianism as the sole national doctrine". From then on, Confucianism was highly respected by the authority and significantly developed throughout China.

[33] Jan Michiel Otto, ed., *Law-Making in the People's Republic of China* (Hague: Kluwer Law, 2000) at 23.

master. More importantly, since the early Continental law is based on two concepts, that of the state over the citizen and that of the *pater familias* over his dependents, it is more similar to Chinese legal traditions and therefore easier to be accepted.[34] Generally speaking, the legal reforms launched by the Qing dynasty were rooted in the centralized feudal monarchy and were designed to save its declining fate. The feudal rulers never voluntarily moved towards freedom, equality and rule of law in China.

In 1911, a revolution led by Dr. Sun Yat-sen overthrew Qing, the last feudal dynasty, and built the first republic in China. Shortly after the foundation, Guomindang[35] initiated a series of legal reforms to solidify its newly-born political regime. The Law Codification Commission resumed comprehensive studies of Western legal systems handed down from the late Qing dynasty and attempted to decide which was the best model for China to study through comparison of individual laws in different countries. The continental laws remained guiding in the codification work during the Guomindang era.[36] In the Civil Code[37], it was said "ninety-five percent of the provisions" have their origin in the

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[34] *Ibid.*

[35] The translation in English is the Nationalist Party. In some works, it is cited as Kuomintang. Sun Yat-sen was the president of Guomindang.

36 The Chinese Nationalist government promulgated five basic codes in a period of five years: Civil Law (1929), Civil Procedure(1935), Criminal Law(1935), Criminal Procedure(1935) and Administrative Law (issued at various dates). See Gene T. Hsiao, *The Foreign Trade of China* (Berkeley: University of California, 1977) at 5.

[37] This is the Civil Code of Guomindang, which was repudiated after the People's Republic of China was founded.

German Civil Code, the Swiss Civil Code and the Swiss Code of Obligations. [38]

Although later many legal scholars of the People's Republic of China intentionally or unwittingly minimized the achievements of the Guomindang era, the facts tell us that the legal reform during that time changed many ingrained feudal traditions among Chinese people, brought in quite a few advanced humanistic ideologies and constituted a basis for the further development of Chinese law. The legal reform, unfortunately, only lasted fifteen years and was interfered with by the Japanese invasion and civil wars, which resulted in the Guomindang government's repudiation by the Chinese Communist Party (hereinafter "CCP") in 1949.

1.2.2 After 1949: Socialist Era

Led by the CCP with Chairman Mao Zedong, the Chinese people, in 1949, overthrew the rule of imperialism, feudalism and bureaucrat- capitalism and founded the People's Republic of China (hereinafter "PRC"). This was announced as a great victory in the New Democratic Revolution.[39] After the foundation of the PRC, drastic changes of policy led to severe shifts in legal theory and practice,[40] which made Chinese legal development even more episodic.

In Marxism-Leninism and Mao Zedong thought, law, stamped by the economic and political character of the ruling class, is a weapon exploited for class struggle and class

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[38] Jan M. Otto, *supra* note 33 at 27.

[39] *The Constitution of 1982 of the PRC*, Preamble.

[40] *Supra* note 2 at 26.

defense.[41] On the basis of this ideology, on January 14, 1949, Mao Zedong first announced that the Chinese socialist law should be completely different from the previous laws made by the exploiting class[42] and therefore, all the Guomindang laws should be abolished. Later, Mao's decision was embodied in an official document issued by the Central Committee of the CCP.[43] From 1949-1954, the PRC government focused on the work of abolishing former laws and building a new socialist legal system.[44]

Following the foundation of the PRC, China was punished by Western countries and was isolated from the world except the Soviet Union and some other East-European socialist countries. Due to its strong economic and military strength, the Soviet Union was respected by other socialist countries, including China, as an "older brother", and the PRC's new legal construction was greatly influenced by the Soviet model.[45]

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41 In Marxism, law can claim validity only within a specified period of time and, therefore, must be considered historically. See Jordan Z.A., ed., *Karl Marx: Economy, Class and Social Revolution* (New York: Charles Schibner's Sons, 1971) at 66.

[42]The CCP announced that the PRC is no longer ruled by the capitalists in the Guomindang time and feudalists in the ancient dynasties. It is a socialist country with the dictatorship led by the working class and based on the alliance of workers and peasants. See *the Constitution of the PRC*, art. 1.

[43]*The Instruction of the Central Committee of the CCP to Abolish the Guomindang Six Codes and to Define the Judicial Principles for the Liberated Areas* states: "Law is the will of the state compulsory and openly enforced through military forces by the ruling class. Law, like the state, is a tool for the protection of the interests of certain ruling classes." Furthermore, it says: "The Six Codes of the Guomindang, like bourgeois law in general, were framed in such a way as to conceal their class character...Thus all Guomindang laws are nothing but instruments designed to protect the reactionary rule of the landlords, the *compradores*, the bureaucrats, and the bourgeoisie, and weapons to suppress and coerce the vast masses of the people." See Jan M. Otto, *supra* note 32 at 29.

[44]In April, 1953, the Second National Conference on Judicial Work called for the strengthening of judicial work and the judicial system, the training of more cadres and the creation of more courts and conciliation committees.

[45]The principles, rules and terms of the Soviet laws were transplanted to Chinese legislation and textbooks.

Before 1955, the Chinese legal construction had achieved some progress. In September 1954, the first PRC Constitution was promulgated with 106 articles emphasizing the rule of the proletariat and the guidance of the CCP. The construction of China's new legal system seemed to be on the right track and the political climate became more liberal than ever. The leaders of the CCP "felt sufficient[ly] secure to call for an era of socialist legality".[46] The Eighth National Congress of the CCP held in 1956 even accepted a very limited conception of rule of law.[47] Mao used the Chinese slogan "let a hundred flowers bloom, let a hundred schools of thought contend" to encourage people to express their individual opinions to help improve socialist construction.[48]

However, such liberation brought about many criticisms against the Party, which were not expected by the leaders. Moreover, the 1957 break between China and the Soviet Union made the domestic and international environment very unfavorable to the CCP. Under these circumstances, the leaders of the CCP began to worry about their power and in order to consolidate it, they chose to launch a series of mass movements.

In 1957, the Anti-Rightist Movement first started. Mao insisted that there were

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Legal organs such as courts, prosecutors and legal professions were also established in accordance with the Soviet model. See Wang Yan, *supra* note 3 at 10.

[46] *Supra* note 2 at 26.

[47] In that conference, the CCP Central Committee approved "the Decision on the Political Report" on September 27th, 1956. It said, "We shall strengthen the legal system of our people's democracy and consolidate the order of socialist construction. The state will gradually enact comprehensive laws on the basis of realistic need." See online <http://www.peopledaily.com.cn/GB/Shizheng/index.htm> (Date accessed: September 14, 2002).

[48] *Ibid.*

many rightists among the intellectuals and judicial cadres who were against the revolutionary undertaking. Those intellectuals who once called for the rule of law under the guidance of Mao's slogan were especially marked as rightists. Many of them were forced to make so-called self-criticisms and some were even deprived of the right to participate in social and political activities. Furthermore, the CCP announced that all state work should consider class struggle *(jieji douzheng)* as a guiding principle.[49] Law was replaced by politics and mass movements. Law professors and students were driven to labor in the country. All the administrative and judicial organs were superseded by the Revolutionary Committees.

The Anti-Rightist Movement launched China into a series of upheavals, including the Great Leap Forward in 1958 and the Cultural Revolution from 1966 to 1976. In those years, the country was in chaos and its economy was on the verge of collapse. Neither legal regulations nor legal consciousness existed in the society. The achievements that had been obtained through legal reforms, which started in the late Qing dynasty, continued through the Guomindang era and ended at the beginning of the PRC, were utterly destroyed.

This chaos did not end until the Third Plenary Session of the Eleventh CCP's Central Committee, held in 1978, declared in its communiqué that the current situation should

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49 The CCP's announcement came from the doctrine of class struggle of Marxism. As an ideological leader of Communism, Karl Marx was a sincere advocate to the class struggle. His basic theory of social classes includes: (1) the existence of classes is only bound up with particular historical phases in the development of production, (2) the class struggle necessarily leads to the dictatorship of the proletariat, and (3) this dictatorship itself only constitutes the transition to the abolition of all classes and to a classless society. See *supra* note 41 at 148.

be stopped and "the emphasis of the Party's work should be shifted to the socialist modernization as of 1979".[50] In the communiqué, the CCP announced that the socialist legal system should be strengthened in order to protect the people's democracy, and furthermore, "institutions and laws should be stable, continual and authoritative" as opposed to arbitrary mass movements.[51] The CCP set up a fundamental principle for new legal reform: "there must be laws for people to follow; these laws must be observed; their enforcement must be strict; and law-breakers must be dealt with."[52] At the end of the communiqué, the CCP called for the National People's Congress and its Standing Committee to shift the legislative work to align with their agenda.

The Third Plenary Session of the Eleventh CCP's Central Committee was a hallmark for the reconstruction of China, especially in the sense of Chinese legal construction. Under the new leadership of Deng Xiaoping, many mistakes made by Mao and the Four Group (*siren bang*)[53] were corrected with the premise that the state should always be guided by Marxism-Leninism and governed by the CCP. The legal departments

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[50] The communiqué of the Third Plenary Session of the Eleventh CCP's Central Committee was passed on December 22nd, 1978. See online <http://www.peopledaily.com.cn/GB/Shizheng/252/5089> (Date accessed: September 14, 2002).

[51] *Ibid.*

[52] *Ibid.*

53 The Four Group, composed of Wang Hongwen, Zhang Chunqiao, Jiang Qing and Yao Wenyuan, was an anti-revolution group during the Great Cultural Revolution. These four people intended to take over the state power by preventing China from returning to the normal construction orbit. In October 1978, the Four Group was overturned, which represents the end of the Great Cultural Revolution.

including the people's courts and procurators were again rendered independent.[54] The legal professors and cadres were called back to work and the universities began to accept students after more than ten years of suspension. Suffering from isolation from the outside world for a long time, Chinese leaders came to realize the importance of an international relationship. An "open door" policy was adopted as one of the fundamental national policies in contrast with the previous "close door" policy. From then on, international economic and technological exchange was greatly encouraged.[55]

In the Third Plenary Session of the Twelfth CCP's Central Committee, it was laid down that the major criterion for examining any reform activity was whether it was helpful in improving social productive forces. Legal pragmatism came back to China after its interruption by the upheavals. In a report named "Marching Along the Social Road with Chinese Characteristics",[56] the following issues were addressed. First of all, in view of the achievements obtained in the ten years after 1978, the "open door" policy should be insisted upon. Secondly, the construction of the socialist legal system should be strengthened. However, the Report said:

"Since China is still on the fundamental socialist process, we cannot study or copy from books. Neither can

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[54] See *supra* note 50. However, as discussed later, it is difficult for these departments to work independently without the interference from political and administrative factors.

[55] See "The Decisions by the Central Committee of the CCP as to the Innovation of Economic System" passed by the Third Plenary Session of the Twelfth CCP in October 1984. This was a programmatic document guiding Chinese economic innovation. It stated, "At present all the countries' production and consumption have become international. Closing door cannot realize modernization... We shall give more favourable policies...reform the foreign trade system with a uniform principle and positively enlarge the scale of foreign economic and technological exchange and cooperation."

56 It was issued by the Thirteenth Conference of the CCP's Central Committee on October 25th, 1987.

we directly transplant the legal systems of foreign countries. We must start in the light of Chinese present situation and combine the Marxism theories with Chinese realities. In the trial-failure practice, let's march along the socialist road with Chinese characteristics."[57]

This was the first time that the phrase "socialism with Chinese characteristics", initially raised by Deng, was announced in an official document. Later it became one of the most-cited phrases in China's reform.

The Fourteenth Conference of the CCP's Central Committee, held in October 1992, determined that the goal of Chinese economic reform was to establish a socialist market-oriented economy. This meant besides the macro control of the government, that the market would act as a basic mechanism for the allocation of resources.[58] The transformation from a former centrally planned economy to the current market economy is a milestone in the development of China.[59]

The radical reforms in China's economy, which is one of the most fundamental and

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[57] *Ibid.*

[58] See "The Decisions of the CCP's Central Committee as to Some Issues with Regard to the Establishment of Social Market Economy System", which was passed in the Third Plenary Session of the Fourteenth conference of the CCP's Central Committee.

59 The core of market economy is the realization of value and free mobility of man, commodity, money and information. In a market economy, every act is designed to realize the value. Contrary to this principle, it will be voided by economic law. In 1992, the Fourteenth Conference of the CCP's Central Committee announced that China will start to establish a socialist market-oriented economy by a series of economic reforms. The following reforms implemented by China, such as the separation of enterprises and government, encouragement of developing private enterprises and gradual abolishment of governmental monopoly etc, really manifest the determination of the CCP for its reforms. Market economy is playing an increasingly important role in China. However, today's Chinese economy is more like in transition from planned to market. Public ownership (now named as state ownership) still occupies a large portion in China's economy. The government, both central and local, still has a great influence to the individual economic components. The intervention by the government to the economy happens quite often. See Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University, 2002) at 3.

decisive elements of the society,[60] accelerated and to some extent generated political, social and legal reforms. Concerned about the stability of the state and sovereign of the CCP, China used to identify every matter with "socialist" or "capitalist" characteristics. However, nowadays, political issues have been taken over by economic development ones.[61]

In the Fifteenth Conference of the CCP's Central Committee held in 1997, for the first time the CCP purported to establish a socialist rule-of-law country. The latest policies made by the CCP and the Chinese government are inclined to be more democratic and transparent.[62] In a developing market economy, the structure of social classes in China is imperceptibly changing.[63] With the emergence of a stronger middle-class, the CCP recently modified its Charter to give admission permission to private enterprisers and other social classes besides the proletariat.[64]

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60 Karl Marx believed that economy was the most fundamental concept of a society. See *supra* note 41 at 66.

61 An example of such transformation is the evaluation of cadres. China used to assess the officers by their leadership in the political campaigns. But nowadays they are evaluated by their leadership in economic development. It is an essential change with respect to the ideological transformation. However, during the period, many problems arose. Sometimes the officers went too far to gain their reputation by blind decisions and irrational development.

62 Democracy is characterized by the rule of law, non-electoral mechanisms for influencing government policy, restraints on the extent of state power, a civil society, and a political culture that sustains these elements. See Juan D.Lindau & Timothy Cheek, eds., *Market Economics & Political Change* (Lanham: Rowman & Littlefield, 1998) at 4.

63 As a communist country, China adheres to Marxism. The theory of social class is perhaps the most widely known of Marx's sociology. The basic assumption of Marxian theory is the belief that social classes perform a decisive function in the evolution of human society. Every social change is related to the class struggle. Marxism believes that the proletariat, composed by workers, presents and intellectuals, is a revolutionary class. See *supra* note 41 at 21-23.

64 The CCP Charter used to state that only excellent workers, peasants and intellectuals may apply to be members of the CCP. But after the revision on November 14, 2002, the new CCP Charter says any excellent

The Sixteenth Central Committee of CCP, which ended in November 2002, announced that China would adhere to the "open door" policy and would gradually improve socialist market economic institutions.[65] The new CCP Charter addressed again that "(s)ticking to the 'open door' policy is our path to development. We shall uphold and improve the socialist market economic institution, and correspondingly, shall carry out reforms in political institutions and other areas".[66] During this process, all the advanced management and technology implemented by Western developed countries are to be assimilated and used for reference in China's development.[67] With these much more open announcements, most people are confidently anticipating that China will go on developing towards globalization by taking democratic reforms step by step.

1.3 China's Current Legal System

1.3.1 The Structure of the State

The Chinese state machine consists of the following organs: the National People's Congress of the People's Republic of China (hereinafter NPC), the president who is

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people over 18 years old who are from Chinese workers, peasants, intellectuals and other social classes may apply to join the CCP. See *the CCP Charter*, *People's Daily*, Overseas ed. (19 November, 2002), Chapter 1, art.1.

65 See Jiang Zemin, "the Report on the Sixteenth CCP's Central Committee", *People's Daily*, overseas ed. (18 November, 2002) at 1.

66 See *the CCP Charter*, Preamble, at 1. However, two questions are raised relating to the current development of China: First, can economic growth continue in the contemporary political climate? Second, can the political regime maintain power if the economic changes take place? To both questions, many scholars are not optimistic given the current Chinese political situation remaining the same. See Kirsten K. Madden, *supra* note 6 at 187. But from the author's point of view, Chinese political reforms are occurring in a gradual manner in stead of remaining unchanged. Therefore, the real answers to these two questions depend on the extent to which the CCP and the Chinese government will implement their political reforms.

67 See Jiang Zemin, *supra* note 65.

subordinate to the NPC as a symbol of the country, the State Council, the Central Military Commission, the local people's congresses and local people's governments at various levels, the organs of self-government of national autonomous areas, the people's courts as the judicial department, and the people's procuratorates as the procuratorial department.[68]

According to the 1982 Constitution, the NPC is "the highest organ of state power" with the Standing Committee as its permanent body.[69] Both the NPC and its Standing Committee exercise the legislative power of the state.[70] The NPC is composed of deputies elected from the provinces, autonomous regions and municipalities directly under the Central Government, and of deputies elected from the army. Based on the comprehensive election across the country, the NPC asserts to be a body where the Chinese people "exercise their state power and represent themselves".[71]

The NPC has the power to amend the Constitution, to supervise the enforcement of the Constitution, to enact and amend basic laws governing criminal offences, civil affairs, the state organs and other matters, to examine and approve the plan and its

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[68] The people's procuratorates, established under the influence of Soviet model, are independent from the governments, conducting procuratorial work and supervising the governments and people's courts. See *the Constitution of the People's Republic of China*, Chapter 3. This system differs from the separation of three powers in many Western countries in that in China the people's courts, people's procuratorates and governments are responsible to and supervised by the people's congress at various levels. See *the Constitution of the People's Republic of China*, art. 3(3).

[69] *Ibid*, art. 57.

[70] *Ibid*, art. 58.

[71] See Xu Chongde, ed., *Jurisprudence and Constitutional Law* (Beijing: Law, 1998) at 285.

implementation for national economic and social development by other state organs, and to exercise such other functions as the highest organ of state power should exercise.[72]

The Standing Committee of the NPC is elected for the same term as the NPC.[73] Although it does not have the right to amend the Constitution, the Standing Committee is entitled to interpret it and supervise its implementation.[74] In addition, it can enact and amend laws with the exception of those that should be enacted by the NPC.[75] When the NPC is not in session, the Standing Committee may partially supplement and amend laws enacted by the NPC if the basic principles of the laws are not contravened.[76] It can interpret laws.[77] Moreover, when the administrative rules and regulations, decisions or orders enacted by the State Council contravene the Constitution or the law, the Standing Committee has the right to amend them.[78]

The State Council, i.e., the Central People's Government, is the executive body of the highest organ of state power.[79] It is the leading body of all the ministries,

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[72] *The Constitution of the People's Republic of China*, art. 62, section 1, 2, 3, 9, 15.

[73] *Ibid*, art. 66.

[74] *Ibid*, art. 67, section 1.

[75] *Ibid*, art. 67, section 2.

[76] *Ibid*, art. 67, section 3.

[77] *Ibid*, art. 67, section 4. Here "the laws" refer to the statutes enacted by the NPC's Standing Committee.

[78] *Ibid*, art. 67, section 7.

[79] *Ibid*, art. 85.

commissions and local governments at all levels.[80] It can adopt administrative measures, enact administrative rules and issue decisions and orders in accordance with the Constitution and laws.[81] It can also alter or amend inappropriate orders, directives and regulations issued by the ministries or commissions.[82] The State Council is responsible to and reports on its work to the NPC, or, when the NPC is not in session, to its Standing Committee.[83]

In China, the Supreme Court and the Supreme Procuratorate are responsible to the NPC and its Standing Committee, while the other lower courts and procuratorates are responsible to the legislative bodies that have engendered them. Moreover, the lower procuratorates are led by the higher procuratorates.[84]

1.3.2 Sources of Chinese Law

Because of different legal ideologies and development histories, various countries have different legal sources. In common law countries, the legal sources are mainly composed of "statutory enactments and cases adjudicated by courts".[85] However, in civil law countries, statutes constitute the major source of law. China has followed the

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[80] See Xu C, *supra* note 71 at 297.

[81] *The Law-Making Law of the PRC*, art. 89 section 1.

[82] *Ibid*, art. 89, section 13.

[83] *Ibid*, art. 92.

[84] *Ibid*, art. 128,133.

[85] Gerald L. Gall, *The Canadian Legal System* (Toronto: Carswell, 1990) at 37.

civil law tradition and statutes form its main legal source.[86] Chinese statutes at different levels include the Constitution, laws, administrative rules or regulations, local rules, rules in the autonomous regions and others.[87]

With respect to conflicts among laws, administrative rules, regulations and other legal sources enacted by the same organ, when the special provision does not comply with the general one, the special provision applies; when the new provision does not comply with the old one, the new provision applies.[88] However, when the new general provision does not comply with the old special provision involving the same matter, the Standing Committee of the NPC shall give the final decision. When it happens to the administrative rules and regulations, the State Council has the right to decide which one to apply.[89]

- ***Constitution***

In every modern democratic country, the constitution is the most fundamental law with the highest legal position and efficacy among all the legal sources. Since 1949 when the PRC was founded, there have been four constitutions proclaimed in 1954, 1975, 1978 and 1982. The currently effective one is the Constitution of 1982 after several

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[86] In addition, in Chinese jurisprudence, custom and policies are regarded as the unofficial sources of Chinese law. See Xu C., *supra* note 71 at 56. For example, the General Principles of Civil Law of the PRC says: "All the civil activities must comply with laws. If there is no related law in this aspect, they must comply with the state policies." See *the General Principles of Civil Law of the PRC*, art. 6.

[87] See *the Law-Making Law of the PRC*. It was passed by the Third Plenary Session of the Ninth NPC on March 15th, 2000 and became into effect as of July 1st, 2000.

[88] *Ibid*, art. 83.

amendments.[90] In China, the Constitution is the mother law providing the fundamental social, economic and political institutions for the state,[91] and no other Chinese laws, rules or regulations can contradict it.[92] The fundamental rights and duties of Chinese citizens and the structure of the state are also provided in the Constitution.

- ***Law (fa lv)***

Interpreted in a broad sense, law may cover all legal documents. Here, law refers to the statutes disseminated by the NPC and its Standing Committee. The NPC only promulgates the basic law, which deals with the fundamental matters of the state. For example, the Criminal Law, the General Principles of Civil Law, and the Contract Law, enacted by the NPC , belong to the basic law group. Besides the basic law, there are some other laws made by the Standing Committee, e.g., Foreign Trade Law and Trade Mark Law. They are called special law in that they mainly deal with particular legal matters.

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[89] *Ibid*, art. 85, 86.

[90] It was adopted and announced to be effective at the Fifth Plenary Session of the Fifth NPC on December 4, 1982. The first amendment was passed on the First Plenary Session of the Seventh NPC on April 12, 1988, the second on the First Plenary Session of the Eighth NPC on March 29, 1993, and the third on the Second Plenary Session of the Ninth NPC on March 15, 1999.

[91] It says, "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People's Republic of China. Disruption of the socialist system by any organization or individual is prohibited." See *the Constitution of the PRC*, art. 1.

[92] *Ibid*, art. 78.

- ***Administrative Rule*** *(xingzheng fagui)*

As stated above, the State Council, the highest administrative organ in China, is granted by the Constitution the power to enact regulatory rules, which are an important portion of Chinese legal sources. When rules are needed in order to perform the law or when the State Council requires rules to exercise its administrative power, the administrative rules will be made by the State Council and approved by the Prime Minister.[93]

In some cases, the NPC and its Standing Committee may delegate the power to the State Council to promulgate in advance an administrative rule concerning a particular matter if they believe it necessary.[94] Subordinate to the Constitution and law, the administrative rule must be consistent with both of them.[95] Otherwise, the Standing Committee of the NPC can repudiate the contradictory content of the administrative rule.[96]

- ***Regulation*** *(gui zhang)*

The various ministries, commissions of the State Council and some other administrative organs can enact regulations based on the law and the administrative rules

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[93] See *the Law-Making Law of the PRC*, chapter 3.

[94] *Ibid*, art. 56.

[95] *Ibid*, art. 79.

[96] *Ibid*, art. 88.

within their statutory authority.[97] Regulations can only prescribe specific matters between the administrative authority and individuals falling within the regulatory field, while in contrast, law regulates all aspects of the basic relations in the society.

According to their various purposes, regulations may be divided into executive regulations, supplementary regulations, explanatory regulations and temporary regulations.[98] The Interim Provisions of Foreign Trade Agency System, promulgated by the Ministry of Foreign Economic Relations and Trade (hereinafter "MOFERT", later renamed "MOFTEC", now incorporated into "Commercial Ministry"), is one of the temporary administrative regulations.

Besides administrative regulations, the local governments at various levels may enact local regulations. In the hierarchy of sources of Chinese law, these regulations are subordinate to law. However, due to their uncertain legality, the status of regulations in the Chinese legal system is controversial.[99] There is no uniform and authoritative rule as

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[97] *Ibid*, art. 71. *The Constitution of the PRC*, art. 90.

98 Executive regulations are formulated to implement laws, administrative rules and decisions. Supplementary regulations are formulated to supplement laws and administrative rules. Explanatory regulations are issued to interpret laws and administrative rules. Temporary regulations may be made under the special delegation by-laws and administrative rules. When, due to insufficient experience, there is urgent need for rules to deal with a subject matter in question while there is no definite provision in this area, temporary regulations are made in this case to fill in the gap. They may gradually be replaced by formally promulgated laws and administrative rules. See Jan Michiel Otto, ed., *supra* note 33 at 107-108.

99 In the Chinese legal system, regulations are subject to judicial review. According to the Administrative Procedural Law of the PRC, the people courts try cases on the basis of laws, administrative rules and regional laws. The administrative and regional rules and regulations may be used as reference by the courts. If the courts believe that the administrative regulations are inconsistent with the regional rules, or the administrative regulations promulgated by the departments of the State Council are inconsistent with each other, the Supreme Court will transmit the administrative and regional regulations to the State Council for interpretation or decision. See *the Administrative Procedural Law of the PRC*, art. 52, 53. The Chinese text appears in *the Collection of Administrative Review Regulation and Related Laws* (Beijing: Chinese Legal

to the procedures for the regulation-making. Furthermore, the lack of supervision of it is a problem in the Chinese administrative legal regime.[100]

- ***Other Legal Sources***

In addition to the legal sources introduced above, there are other sources in the Chinese legal system, including laws in the special administrative region, and laws and rules in the autonomous areas. International treaties and conventions, as long as they are signed and ratified by the Chinese government and do not contravene Chinese domestic statutes, are also a part of Chinese law. However, whether international practice is a legal source in China is debatable. The majority of Chinese legal scholars accept the view that international practice may become legally binding in regards to the decisions of Chinese courts.[101] Precedents in China are of no legal efficacy and are not binding for the judges. Till now, there is no official decision-releasing system established nationwide. However, the cases decided by the Supreme Court and published in the People's Court News or other official journals actually, to some extent, direct the lower courts for reference.

System Press, 1994) at 28.

100 See Jan Michiel Otto et al., *supra* note 33, at 105.

[101]See Xu C., *supra* note 70, at 61. In the General Principles of Civil Law of the PRC, it says "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions." See *the General Principles of Civil Law of the PRC*, art. 142. Online: <http://www.ceilaw.com.cn/dcd001/owa/cei.fgdetail_query?incode=111401198601> (Date accessed: January 12, 2002).

1.4 Restraints to the Further Development of Chinese Law

Law cannot be truly understood except in the context of "the entire social scenario of a particular community".[102] The drastic changes that have occurred in China's economy, politics and society since 1978 have impacted critically on present Chinese legal reforms. The "open door" policy helps the Chinese government realize the importance of international law, which helps achieve globalization.[103] A market economy helps accelerate the building of a systematic legal system to regulate all economic activities. Since 1978, the NPC and its Standing Committee have enacted 411 statutes related to constitutional law, civil law, commercial law, criminal law, administrative law and labour law. Among them, 112 laws and legal decisions were approved during the past five years.[104] In addition, a large volume of administrative rules, regulations and other legal documents have been enacted at different legislative levels.

The Chinese legal system, described as "one characterized both by eclectic borrowing from foreign legal system and by the strong effects of contemporary, as well as traditional, cultural and political influences",[105] has been under construction. Most

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102 Wang Chenguang & Zhong X., eds., *Introduction to Chinese Law* (Sweet & Maxwell, 1997) at 18.

103 Alongside the development of globalization, anti-globalization force is emerging across the world. The protest taking place in Seattle when the WTO initiated its negotiations was regarded as a symbol of the development of anti-globalization. The fundamental arguments of anti-globalization are involved with anti-war, anti-hegemonism and anti-capitalism throughout the world. There are many debates on whether the globalization or the anti-globalization more conforms to the historical trend of the times. See online <http://jczs.sina.com.cn> (Date accessed: November 29, 2002).

104 The Ninth NPC (from 1997 to 2002) approved and proclaimed 75 laws including 1 constitutional revision, 8 legal interpretations to law, and 29 legal decisions. See "List of Laws Enacted by the Ninth NPC", *People's Daily*, overseas ed. (March 1, 2003) at 8.

105 Perry Keller, ed., *Chinese Law and Legal Theory* (Aldershot: Ashgate, 2001) at xii.

people are optimistic with respect to China's on-going legal reform. However, many restraints either rooted in China's legal traditions or in the rule of the CCP with its Marxism-Leninist doctrine make the prospect of Chinese legal reform remain vague and uncertain.

As we have seen, under the influence of Legalism and Confucianism, law in China has often been regarded and used as a tool for the rulers. Although Legalism raised law as the supreme power other than the ruler's, it still emphasized that law was used to consolidate the rule of the state. Confucianism protected the feudal monarchy even more evidently, either by *li* or by harsh criminal regulations that were the last resort to maintain the social hierarchy. These doctrines advocated inequality between the ruler and the ruled. Concepts such as freedom and equality were foreign to ancient China.

Through Qing and Guomindang's legal reforms, many democratic concepts were introduced into China for the first time and some were even accepted by the ruling class. However, the rulers did so not because they accepted democratic ideologies, but simply because they could not reverse the historical tendency and tried to maintain their power by doing so. In addition, they never gave up their dictatorship over the country when they made or attempted to make new laws.

The CCP is not an exception with respect to this instrumentalist approach to law. In today's China, law is an important instrument "serving the goal of economic development".[106] It does not seek to set a limit on state power; rather it is "a mechanism

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106 Yu Xingzhong, "Legal Pragmatism in the People's Republic of China" (1989) 3 Journal of Chinese Law 29 at 41.

by which state power is exercised".[107] However, such a purely pragmatic approach to legality is "most certainly harmful to the development of a comprehensive and stable legal order"[108] because it lacks a foundation of rule of law as in other developed countries.[109]

The supremacy of the CCP weakens the role of law in that the Party's policies are always considered more important than laws.[110] Law in China is even called "a servant of policy".[111] The NPC, which is provided with the highest state power in the Constitution, is called a "rubber-stamp congress",[112] because it merely discusses and approves major issues such as new policy directions, laws, budgets and major personnel changes that have been endorsed by the CCP's Central Committee. Furthermore, the CCP is under the leadership of several features in its Politburo (*zhengzhi ju*). There is more sense of rule of man rather than rule of law in some vital decisions of the state. Although the struggle for rule of law has been developed in China for a century and the Chinese authority asserts to accept this principle, its practical application is far from

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107 Pitman Potter et al., *supra* note 62 at 161.

108 *Ibid*, at 49.

109 Rule of law is a difficult and comprehensive conception. Basically, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the notions of a government of laws, the supremacy of the law and equality of all before the law. It is widely accepted that a rule-of-law state should contain certain features, including democratic political system, free-market capitalism and respect of human rights. See Randall Peerenboom, *supra* note 58, at 3.

110 See Wang Yan, *supra* note 3 at 11.

111 Yu Xingzhong, *supra* note 106 at 46.

112 See "State Structure", online <http://www.geocities.com/ccparty2002> (Date accessed: September 20, 2002).

being achieved.

Another critical restraint to Chinese legal reform is that there is no self-evident similar experience for it to study. As a huge country with a long complex history, especially as the largest socialist country, China cannot completely emulate any other country for its development in the new millennium. From the Qing dynasty until now, China has studied extensively from civil law countries and common law countries. However, transplantation of a foreign countries' law is not simple, and it can even be dangerous with respect to its distinct history and different levels of development.

Under the pressure resulting from the tremendous gap between the realistic need and the present backward legal system, the Chinese legislature has been making new laws in a rush without enough attention paid to ensure the maturity of these laws. Technical mistakes can be found in many of them. Sometimes, concepts from common law coexist with those from civil law in a particular legal area. The resulting conflicts are unavoidable.[113] The Chinese authority justifies this conflict as being the objective result of "actuality"[114] and names this situation as "practice with Chinese characteristics". However, in my view, they are more like excuses for the Government's over-anxiety for results.

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113 A good example is the conflict of legal rules in the Chinese foreign trade agency law. For its critical analysis, see Chapter 3.

114 Yu Xingzhong, *supra* note 106 at 45. The Chinese authority addresses the difficulty and complexity of actual situation in China and contends that conflicts and mistakes they have made are the unavoidable by-product during the reforms. However, it is said that the Chinese laws and regulations are intentionally ambiguous so as to provide policy-makers and implementing officials alike significant flexibility in interpretation and implementation. See Pitman, *supra* note 62 at 162.

Under the rule of the CCP, Marxist-Leninist-Maoist ideologies are firmly upheld and "cannot be directly challenged or repudiated".[115] The political ideologies are always claimed to be fundamental to the social construction and innovation. As a result, books and articles by Chinese scholars are written in an astonishingly uniform "coded fashion".[116] It is difficult to find any critical analysis of the sensitive legal issues related to the CCP and Chinese politics from those legal works. The lack of a real open and democratic environment for the critical study of Chinese law, undeniably, restricts the further development of Chinese legal reform.

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115 Wang Yan, *supra* note 3 at 14.

116 *Supra* note 105 at i-Introduction.

CHAPTER 2

CHINESE FOREIGN TRADE AGENCY LAW

Introduction:

This chapter is divided into two parts. The first is an introduction to China's foreign trade development that seeks to provide readers with a basic understanding of the turbulent history of China's foreign trade and an accurate impression of its present status as an important force in not only China's economy but also the world economy.

The other part of this chapter is about Chinese foreign trade agency law. In this part, based on the introduction of Chinese foreign trade operation permit system and Chinese foreign trade agency system, the author describes the content of current Chinese foreign trade agency law as a preface to the further examination and analysis offered in the following chapters.

2.1 Introduction to China's Foreign Trade

2.1.1 History of China's Foreign Trade Development

China once played an important and active role in international trade. The famous "silk road", which was named after the caravan routes taken by traders between China and West Asia, connected China with the outside world. However, the prosperous foreign trade era was interrupted in the 19th century when the Chinese government implemented a "close door" policy, causing its economy to decline just as Western countries were speeding up the development of their industrial and technological innovation. In the late 19th century until the beginning of the 20th century, China was gradually turned into a semi-feudal and semi-colonial country[1] and, as a result, was forced to sign a series of unfair trade treaties with the Western invaders.[2]

After the Second World War, especially in the past forty years, international trade, including trade in goods, service, capital and labor, was substantially developed.[3] Currently, one of the most mentioned words is globalization, which reminds us of what a significant influence international trade and communication has brought into our lives. However, upon the foundation of the People's Republic of China in 1949, all of the Western countries closed their doors to China except the Soviet Union and some

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[1] *The Constitution of the People's Republic of China*, Preamble.

[2] Since the Opium War between China and Great Britain in 1840, China was immersed into numerous battles with foreign invaders, including Japanese, French and British. China was in a critical situation facing foreign aggressions. In 1900, the collective military force comprising eight countries invaded China and attacked Beijing. Upon its defeat, China was obliged to sign the *Xinchou Treaty*, which was a symbol of humiliation for China.

[3] According to the statistics, since 1965, global economic growth rate has been around 3-5%. However the international trade growth rate has always been as high as 11%. See Han Jinlun, *Fundamental Theories and Practice of International Trade* (Tianjin: Nankai University, 1994) at 356.

socialist eastern European countries. Trade between China and the socialist countries constituted more than 70% of China's foreign trade.[4] The general economic policy in China focused on rapid industrialization through self-reliance.[5] China's foreign trade was oriented to import substitution and was inward looking.[6] Foreign trade was mainly used as a tool to strengthen China's political independence and cooperation with friendly socialist countries and countries of the Third World.[7] By and large, China being isolated from the outside world, foreign trade played a relatively trivial role in China's economy before 1979. Furthermore, as one of the most centrally controlled aspects of the state economy, China's foreign trade was adjusted to conform to its centralized administration and planned economy. That is, the state centrally allocated import and export through limited state-owned foreign trade companies.[8]

The implementation of the "open door" policy commencing in 1979, the purpose of which was to "integrate the Chinese economy into the world market",[9] gave rise to radical reforms in China's foreign trade, along with the simultaneous shift from mass

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[4] Wu Baifu, *New Edition of International Trade Practice* (Shanghai: Knowledge, 1995) at 2.

[5] David Wall et al., *China's Opening Door* (London: Royal Institute of International Affairs, 1996) at 95.

[6] *Ibid.*

[7] Gene T. Hsiao, *The Foreign Trade of China* (Berkeley: University of California, 1977) at 8. More specifically, the goals of foreign trade for China were to help China avoid imbalance of international income and cost, to help China separate its domestic market from any instability in the outer market, and to help China protect unripe domestic industry by controlling the level and composition of export and import. See Yang Shengming, ed., *Economic Globalization and Construction of China's Foreign Trade* (Nanjing: Jiangsu People's Press, 2000) at 37.

[8] See Guanghua Yu & Minkang Gu, *Laws Affecting Business Transactions in the PRC* (Hague: Kluwer, 2001) at 227. Yang S., *ibid,* at 286. At that time, there were only 12 companies who were entitled to engage in foreign trade in China. See David Wall, *supra* note 5 at 99.

[9] Kanishka Jayasuriya, ed., *Law, Capitalism and Power in Asia* (London: Routledge, 1999) at 69.

movement to economic modernization. These reforms can be roughly catalogued into two phases.[10] The first is foreign trade construction under the mercantile economy from 1979 to 1993. During this period, reforms were mainly concentrated on the issue of broadening the granting of foreign trade operation permits. Industrial and local trade departments were allowed to participate in the foreign trade business and to compete with central-state-owned foreign trade corporations. The decentralization of foreign trade operation permits led to liberalization of China's foreign trade which had been characterized by its strict monopoly.

Besides the decentralization of foreign trade, the Chinese government decided to innovate the foreign trade system through strengthening and improving the macro control and management by the state.[11] In 1984, the State Council introduced three principles for foreign trade system reforms. The first was the separation of state and enterprises. The second was the implementation of a foreign trade agency system. The last principle was the combination of manufacturing and trade, of technology and trade and of import and export.[12]

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[10] See Yang S., *supra* note 7 at 290. Some scholars divided them into three stages: pre-1987, between 1988 and 1991, and the years after 1992. The first stage was characterized by decentralization of administrative control on an experimental basis. Agency system was introduced for the first time in 1984 and approved by the World Bank. The second stage was characterized by a change from planning control to the use of commercial policies such as tariff and license. The latest stage was characterized by its reduction of trade barriers. See David Wall, *supra* note 5 at 98-108. However, this thesis adopts the division of two stages mainly on the consideration of its relevance to foreign trade agency reforms.

[11] To decentralize the economy (relying more on market forces in making decisions) and to integrate it further into the world market are called the two main aims of China's economic transition after 1978. See Olivier B., Fabrizio C. & F.Lemoine, eds., *Different Paths to A Market Economy* (Paris: OECD, 1998) at 64.

[12] See Yang S, *supra* note 7 at 290.

In 1992 after the South Survey of Deng Xiaoping, the establishment of a socialist market economy was proclaimed by the CCP. The final obstacle to China's further development, the debate regarding "whether China should be named as socialist or capitalist", was cleared away. China asserts, without hesitation, to learn from Western developed countries by all means and to do things in accordance with international practice.

The second phase of Chinese foreign trade reforms began in 1994 and has lasted until the present under the direction of Deng's socialist theory with Chinese characteristics. This stage's reform is characterized as to immediately establish a foreign trade system that suits the development of China's socialist market economy and that complies with international trade regulations.[13] The encouragement of implementation of the foreign trade agency system remains an important part of China's latest reform to its foreign trade regime.

In brief, the ongoing reform of China's foreign trade can be characterized as seeking to enhance the openness of two aspects: diversity of lines of business, and variety of ownership involving foreign trade.[14] In contemporary China, not only foreign trade corporations but also industrial manufacturers, research institutes and other professions are entitled to deal with foreign traders if they fulfill the requirements provided in Chinese Foreign Trade Law and other relevant legal

[13] *Ibid*, at 290.

[14] *Ibid*, at 262.

provisions.[15] In addition, it has become possible for the businesspeople of private and collective ownership to acquire a foreign trade operation permit. In 1996, MOFTEC proclaimed the Interim Regulations as to the Establishment of Joint Foreign Trade Ventures, which officially accepted other ownership forms besides the state into China's foreign trade.[16]

Undoubtedly, the introduction of foreign companies will intensify competition among foreign trade operators, which will help improve the quality of China's foreign trade and accelerate the inner reform of state-owned foreign trade corporations. A multiple foreign trade system is under construction in China. Broader openness leads to more freedom. Despite some restrictions and policy preferences, most of China's foreign trade operators are able to compete on equal terms.

On November 11, 2001, China was accepted as a member of the World Trade Organization (hereinafter "WTO") after a fifteen-year negotiation period. China's accession to the WTO is considered a landmark in China's foreign trade development and a symbol of China's integration into the mainstream world. From now on, other WTO members cannot discriminate against China when conducting international business. However, according to the Protocol of the Accession of the People's Republic of China to the WTO (hereinafter "Protocol"), "except as otherwise provided

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[15] As to the categories of current foreign trade operators, see Mark Williams & Zhong Jianhua, "The Capacity of Chinese Enterprises to Engage in Foreign Trade: Does Restriction Help or Hinder China's Foreign Trade Relations?" 8 Journal of Transnational Law and Policy 197 at 203-216.

[16] In July 1997, the first three joint ventures of foreign trade were established in China. However, according to the Interim Regulations of 1996, the requirements for the establishment are very demanding. For example, the annual income of the foreign party of joint venture must be no less than 5 billion US dollars in the previous year before application, etc. Therefore, the threshold for the foreign trade operation permit is still very high to foreign companies.

for in the Protocol, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force".[17] This means China has to reciprocally assume required fundamental obligations, e.g., giving national treatment to foreigners, unifying its trade policies, perfecting its related laws and rules, improving the transparency of government and eliminating the restrictions of foreign trade operations.[18] Therefore, the accession to the WTO is not only an opportunity, which is emphasized by the optimistic government, but also a demanding challenge to China.

2.1.2 Present Status of China's Foreign Trade

According to the statistics from China's international trade bureaus and the office of Chinese customs, China's foreign trade business developed at a high rate almost every year from 1978 through 2001.[19]

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[17] See "The Protocol of the Accession of the People's Republic of China to the WTO", Part 1, art. 1.3, online <http://wto.moftec.gov.cn> (Date accessed: March 16, 2002).

[18] Guan Linren, *Explanations to the Protocol of the Accession of the People's Republic of China* (Beijing: Chinese Democracy and Law, 2002) at 13.

[19] The annual growth rates of China's foreign trade from 1978 to 2001 were as follows: 39.4%, 42%, 28.9%, 16.4%, -5.5%, 4.8%, 22.8%, 30%, 6.1%, 11.9%, 24.4%, 8.7%, 3.4%, 17.6%, 22.0%, 18.2%, 20.9%, 18.7%, 3.2%, 12.2%, -0.4%, 11.3%, 31.5% and 7.5%. These statistics are from the MOFTEC website. See online <http://www.moftec.gov.cn/moftec_cn/tjsj/jcktj/kb2002_5.html > (Date accessed: June 21, 2002). The numbers of the years before 1981 are from a calculation of the Chinese international trade department. The rest are from the statistics of the office of Chinese customs. The notable factor that affected China's foreign trade in the late 1990s was the Tian An Men Square Incident. In 1997 and the following several years, as well known, the Southeastern Asian Financial Crisis caused the decline of global trade, which severely affected China's foreign trade at that time.

According to the latest statistics from the office of Chinese Customs, from January to December 2002, the national import and export total value was 620.785 billion U.S. dollars. The growth rate was as high as 21.8%. The export was 325.569 billion U.S. dollars with the growth rate of 22.3%; the import was 295.216 billion U.S. dollars with a growth rate of 21.2%. The favorable balance of 2002 was 30.353 billion U.S dollars, which increased 34.6% compared with the amount for the same period in the previous year. More excitingly, the favorable balance in December 2002 was increased 49.4%.[20] Such a striking, high two-digit growth rate is very rare for Western developed countries. According to the statistics from the WTO, the total value of China's foreign trade in 2001 had exceeded that of Canada. Therefore, through twenty-odd years of reform, China has become the sixth largest international trading country in the world with the only positive annual percentage change in world merchandise trade among the top ten leading exporters and importers.[21]

2.2 Chinese Foreign Trade Agency System

2.2.1 Chinese Foreign Trade Operation Permit System

In developed countries, businesspeople are used to two types of trade: direct and indirect. Direct trade, on the surface, means doing business between the seller and buyer. This kind of trade is prominently used in domestic transactions. However, when dealing with international trade, doing business through an agent is also familiar. For

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[20] See online < http://www.moftec.gov.cn/moftec_cn/jcktj/tjkb/kb2002_12.html> (Date accessed: January 28, 2003).

[21] See online <www.wto.org/english/res_e/statis_e/its2002_e/section1_e/i05.xls> (Date accessed: February 5, 2003).

example, in European and North American countries, international trade through an agent usually occupies 20% - 30% of the total trade. However, in Japan the percentage is as high as 80%.[22]

Trade through an agent is popular in developed countries because of its distinctive advantages. The agents' local knowledge and connections with the target market are valuable resources to help businesspeople understand and deal with the language, laws, customs, and confusing business practices of foreign countries.[23] For international trade transactions of advanced technology or of a high professional content, these advantages are more obvious. The agents are familiar with the international market. They have their own sales conduits and also have professional knowledge to deal in international trade. The cooperation between manufactures and agents can reduce the cost and decrease the risks of international trade.[24]

However, despite encouragement from the Chinese government, statistics show that in China, foreign trade through an agent is not as popular as in most developed countries.[25] There are many reasons for this lack of popularity, the most important being that the institution of foreign trade agency in China is not built on an economic

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[22] See Fu Jinyan, "A Study on the Effects to China's Foreign Trade Agency System Caused by the New Contract Law" Vol. 182, 5 Finance and Trade at 43.

[23] Anne Curran & Gerhard Kautz, *Exporting from Canada* (Vancouver: Self-Counsel, 1994) at 30.

[24] See Wu Yuanyi, "The Choice of Chinese Foreign Trade Agency System" Vol. 17, Journal of Suzhou Institute of Silk Textile Technology, No.5, at 121.

[25] In 1990, export through agents in China occupied 7.2% of the total export. However, in 1994, it occupied only 1.4%. In recent years, it occupies around 0-5%. See Xin Hong, "Problems existing in China's Foreign Trade Agency System and the Legal Countermeasures" Vol. 29, 3 Journal of Nanchang University at 51; Fu Jinyan, *supra* note 22.

and voluntary basis as it is in Western countries, but rather on an administrative restriction, that is, the foreign trade operation permit system.

The foreign trade operation permit system is the cornerstone of the Chinese foreign trade agency system. As introduced above, historically China possessed a planned economy and put everything under the centralized control of the government. In the foreign trade area, state-owned foreign trade corporations monopolized business.[26] Although the monopoly of state-owned corporations has been abolished and things have significantly changed,[27] Chinese law still closely regulates foreign trade operators through the foreign trade operation permit system.

To apply for a foreign trade operation permit, foreign trade operators must fulfill certain requirements, including that they have its own name and corporate structure, a definite scope of business in foreign trade, a place of business, financial resources, and professional personnel. In addition, they should have a required record of imports and exports effected on their behalf or have necessary sources of goods for import or export.[28] Besides these requirements, the State Council has the power to lay down detailed rules and regulations for extra requirements to some particular lines of foreign

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[26] Guanghua Yu & Minkang Gu, *supra* note 8 at 227.

[27] Until now, there have been 21 kinds of enterprises that may apply for foreign trade operation permits, including enterprises in commerce, research institutions, Chinese-foreign trade joint ventures etc. See online <http://iecms.ec.com.cn/iecms/index.htm> (Date accessed: July 4, 2002).

[28] See *the Foreign Trade Law of the People's Republic of China*, chapter II, article 8. The Chinese text of Foreign Trade Law is from *The Latest Commonly-Used Commercial Laws and Rules* (Beijing: Chinese Fangzheng Press, 1995) at 130. The English text is online <http://www.ceilaw.com.cn/dcd001/owa/cei.fgdetail_query?incode=111705199402> (Date accessed: December 20, 2001).

trade business.[29] Unless the corporations have met the statutory requirements and have been approved by the government, they cannot acquire a foreign trade permit from the authority responsible for foreign trade and economic relations under the State Council.[30] Under these strict requirements set for the Chinese foreign trade operation permit system, only very limited enterprises are entitled to directly deal in foreign trade in China, while individuals and most enterprises are excluded from foreign trade.[31]

China's foreign trade operation permit system has a long history established under the influence of the Soviet model.[32] However, its inherent defect remains. This system deprives all Chinese natural persons and most legal persons of an operation right in the international trade field, which leads to two parallel systems concerning trade co-existing in China: a comparatively free system with respect to domestic trade, and a rigid administrative system for foreign trade. Although it is common in the Western countries that the governments implement macro-control over the trade, the restraint imposed by the Chinese law on the parties' legal ability to enter into contracts only because the contracts contain a foreign element is "an unusual notion" in the international practice.[33] The Chinese government tried to justify this peculiar situation

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[29] *Ibid.*

[30] *Ibid.*

[31] Guanghua Yu, *supra* note 8 at 222. In 1996 there were only about 11,000 legitimate foreign trade operators in China and most of them were state-owned. See Wu Yuanyi, *supra* note 24.

[32] Mark Williams & Zhong Jianhua, *supra* note 15 at 198.

[33] For example, English law confers the full freedom to English contractors, no matter to deal with domestic trade or foreign trade, given that the contracts are not contrary to public policy. See *ibid*, at 218.

by using the excuse of "Chinese characteristics".[34] As a matter of fact, the parallel legal systems are merely a product resulting from a former centrally-planned economy sticking to a "close door" policy.

2.2.2 Chinese Foreign Trade Agency System

Under the tight control of the Chinese foreign trade operation permit system, foreign trade became so privileged that it restricted the further development of China's foreign trade. The most serious problem that arose was that almost all enterprises preferred to sell goods to foreign trade operators in order to reduce their own risk and to accelerate capital circulation. Consequently, the Chinese domestic enterprises were indifferent to the outer world market and were ignorant of the international rules and laws. On the other hand, foreign trade operators, who had to buy the goods themselves for import or export, were obliged to bear the whole contractual obligations and risk throughout foreign trade transactions.

In order to solve these problems, the Ministry of Foreign Economic Relations and Trade (hereinafter "MOFERT", later renamed "MOFTEC", now incorporated into "the Commercial Ministry") first introduced the foreign trade agency system in 1984 through a document named "A Report on the Opinions for the Reform of Foreign Trade System". In this report, MOFERT initiated the following suggested reforms to China's foreign trade system: firstly, governmental administration should be separated from enterprise management; secondly, the monopoly of stated-owned foreign trade

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[34] See Chapter 1.

operators should be abolished; thirdly, the establishment of a connection between foreign trade operators and manufacturers was encouraged; lastly, a foreign trade agency system should be implemented.

Furthermore, the foreign trade agency system was defined in the report as an agency relationship "in which an agent carries out import or export operations on behalf of a principal who is the end user or a production enterprise and charges a commission for this service".[35] This system was adopted as a new important policy for the innovation work of China's foreign trade in the following years.[36] In 1994, the foreign trade agency system was affirmed in the Foreign Trade Law of the PRC (hereinafter "FTL").[37]

The Chinese government believed that through these practices those problems caused by the foreign trade operation permit system could be solved easily. That is, although a rigid foreign trade operation permit system exists in China, and therefore most domestic enterprises are not eligible to deal in international trade, these enterprises could entrust legitimate foreign trade operators to help them do business indirectly with foreigners. Moreover, since the relation between manufacturers and foreign trade operators turns from "sale-buy" to "entrust-proxy", the manufacturers'

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[35] Zhong Jianhua & Mark Williams, *Foreign Trade Contract Law in China* (Hong Kong: Sweet & Maxwell, 1998) at 60.

[36] In 1993, the Third Plenary Session of the Fourteenth CCP's Central Committee confirmed the foreign trade innovation principles as follows "Unify Policies, Open Operation, Compete Fairly, Manage Independently, Bear Profit or Loss, Connect Manufacturers and Trade Operators and Pursue the Foreign Trade Agency System". In 1996 the former premier Li Peng pointed out, "We should reform our foreign trade system and carry out the foreign trade agency system, in order to speed up the diversification of our market." See Xin Hong, *supra* note 25.

[37] See *the Foreign Trade Law of the People's Republic of China*, art. 13.

interests would be connected with that of the operators, and with the international market. On the other hand, the government believed that through these policies, foreign trade operators would also be closer to the manufacturers than before because the value of imports and exports would affect their commission.

However, through practice in the past ten years or more, the outcome has not been satisfactory.[38] Many Chinese legal scholars have probed into the causes and have sought methods to improve the situation. Most of them agree that besides its administrative basis, the lack of an effective and systematic law to regulate the Chinese foreign trade agency system is one of the most fundamental reasons.[39] How to improve the corresponding law has become a pressing issue.

Similar to the foreign trade operation permit system, the foreign trade agency system also has a theoretical flaw. There is a basic legal principle in the Chinese civil law that a civil juristic actor shall have the full capacity for civil conduct, so that his acts can be valid.[40] For that reason, no one can authorize the right to another person that he himself does not have, otherwise such an authorization is invalid. Since in an agency relationship the real party of interest is the principal rather than the agent, it is

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[38] See note 25.

[39] See Wei Ninghong, "Some Suggestions on How to Accelerate Foreign Trade Agency System" (1999) 2 Journal of Shanxi Economic and Administrative Management Officers College at 45. Wu S. & Tuo J., "Contract Law- An Improvement of Agency Regulations and Foreign Trade Agency System" Vol. 29, 3 Journal of Lanzhou University at 94. Fu Jinyan, *supra* note 22. Xin Hong, *supra* note 25.

[40] See *the General Principles of Civil Law of the PRC*, art 11, 58. Its Chinese text is in *The General Principles of Civil Law of the PRC* (Beijing: Chinese Legal System Press, 1994), at 12. The English text is online <http://www.ceilaw.com.cn/dcd001/owa/cei.fgdetail_query?indode=111401198601> (Date accessed: December 20, 2001).

necessary that the principal should be "competent to make a contract" and thus he may "employ an agent and invest him with authority" to act on his behalf in a legitimate transaction.[41] In other words, an incompetent principal is not qualified to act through an agent, even though the agent may be competent for the acting.[42] Judging from this, since Chinese enterprises without a foreign trade operation permit are not entitled to do business directly with foreigners, how can they entrust other people as their agents to act on their behalf and in their interest? The logical conflict cannot be solved until the foreign trade operation permit system is repealed.[43]

2.3 Legal Sources of Chinese Foreign Trade Agency Law

China follows the tradition of civil law systems in that statutes are the supreme and major legal source, and individual cases are then decided in accordance with "these basic tenets".[44] In the Chinese legal system, civil activities are divided into two categories: domestic activities and activities with foreign elements. Corresponding to each of them, there is a distinct legal regime. In the foreign trade area, law is relatively

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[41] William A. Ferguson, *Modern American Law, Agency* (Chicago: Blackstone School of Law, 1959) at 13.

[42] In the common law countries, there is a well-established legal principle called "*nemo dat quod non habet*", which is similar to the Chinese civil principle. It means no one can transfer to another something that he has not got himself. See G.H.L. Fridman, *Sale of Goods in Canada* (Toronto: Carswell, 1986) at 119.

[43] Nevertheless, there is a differing but minor opinion which states that it is not a logical conflict. Holders of such opinion defend that the foreign trade agency is an independent service relationship, which does not need any authorization from the principal. Therefore, whether the principal is competent for the entrusted matter is immaterial. See Chen Zhiyong, "The Contract Law and Foreign Trade Agency System" Vol. 22, No. 2 Journal of Huaiyin Teachers College 24. However, this opinion confuses the meaning of agency and does not realize that valid authorization from the principal is essential to the formation of an agency relationship.

[44] Gerald L. Gall, *The Canadian Legal System* (Toronto: Carswell, 1990) at 29.

primitive compared to the detailed law dealing with domestic trade.[45] According to the legal hierarchy, Chinese foreign trade agency law comprises the following legal sources:

(i) the General Principles of the Civil Law of the PRC (hereinafter "GPCL");

(ii) the Contract Law of the PRC;

(iii) the Foreign Trade Law of the PRC (hereinafter "FTL");

(iv) the Interim Provisions for the Foreign Trade Agency System (hereinafter "IPFTAS").

For better understanding, these four laws and rules will be described in sequence of adoption.

- *GPCL*

GPCL was adopted at the fourth session of the sixth National People's Congress (hereinafter as "NPC") on April 12, 1986 and became effective as of January 1, 1987. Containing the majority of principles and rules of Chinese civil law concerning civil juristic activities, GPCL is called a general law (*yi ban fa*) in the Chinese legal system.[46] All legislation regarding civil law, including laws and rules promulgated before and after the promulgation of GPCL must agree with the general principles laid out in GPCL.

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[45] See Guanghua Yu & Minkang Gu, *supra* note 8 at 227.

[46] The readers should be aware of the difference between civil law and the civil law system. Civil law refers to a body of legal principles and rules governing property and personal relations between equal parties as subjects. It is a branch of law, analogous to criminal law. See Wang Chenguang & Zhang Xianchu, eds., *Introduction to Chinese Law* (Hong Kong: Sweet & Maxwell, 1997) at 169-170. On the other hand, the legal system refers to the legislative, executive and judicial system of the country.

The enactment of GPCL was heavily influenced by German law and also by Soviet civil law. The regulation in GPCL relating to the agency stipulated in Part 2 of Chapter 4[47] is said to be "one of the most sophisticated concepts developed by the German Civil Code and adopted by many civil law countries."[48] Article 63 provides that "citizens and legal persons may perform civil juristic acts through agents". Furthermore, an agent shall perform civil juristic acts in the principal's name within the scope of the power of agency, and subsequently the principal shall bear civil liability for the agent's acts of agency.[49]

According to GPCL, the agent *must* perform the civil acts in the principal's name. It is therefore contended that the agent has to bear all the liabilities of the acts done in his own name unless he transfers the liabilities to the principal. If an entrusted agent needs to transfer the agency to another person for the principal's interests, he must first obtain the principal's consent. Otherwise, the agent shall bear civil liability for the acts of the transferee; however, an entrusted agency transferred in emergency circumstances in order to safeguard the principal's interests is excluded.[50]

Because of the GPCL's legal efficacy, such a definition of agency should be followed and be complied with by all the other civil laws. However, as revealed later,

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Currently common law systems and civil law systems are the two main legal systems in the world. See Wang Guiguo & John MO, eds., *Chinese Law* (Hong Kong: Kluwer Law, 1999) at 3. The distinctions between the common law and civil law system, see Gall, *supra* note 44 at 29.

[47] See *the General Principles of Civil Law of the PRC*, art. 63-70.

[48] Wang Chenguang, *supra* note 42 at 196.

[49] *Ibid*, art. 63.

[50] *Ibid*, art. 68.

the definitions provided by the other legal sources concerning the foreign trade agency do not comply with the one in GPCL.

GPCL divides agency into entrusted agency, statutory agency and appointed agency. In an entrusted agency, the agent's authority derives from trust by the principal; in a statutory agency, it derives from prescription by law; and in an appointed agency, it derives from designation by a people's court or an appointing unit.[51] A civil juristic act may be entrusted to an agent in writing or orally, unless legal provisions require that it should be written.[52] If the power of an agent is not clear regarding the authority conferred, the principal shall bear civil liability towards the third party and the agent shall be held jointly liable.[53] Article 66 provides for the ratification of an invalid agency, *viz*, the principal, who once recognizes the act performed by an actor with no power of agency, beyond the scope of his power of agency or after his power of agency has expired, shall bear civil liability for the act.

Since GPCL was promulgated shortly after the proposal of the foreign trade agency system, it did not pay any attention to the foreign trade agency as a special institution. Nevertheless, because of the supreme legal efficacy of GPCL in the Chinese civil law, regulations stated above are regarded as the basic principles of the Chinese agency law, including the foreign trade agency law.[54]

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[51] *Ibid*, art. 64.

[52] *Ibid*, art. 65.

[53] *Ibid*.

[54] Zhong Jianhua & Mark Williams, *supra* note 35 at 60. At present, Chinese agency law merely refers to a legal area where regulations concerning agency are scattered in various Chinese laws and are far from being systematic and comprehensive.

• ***IPFTAS***

IPFTAS was promulgated by MOFERT on August 29, 1991 and became effective at the time of announcement. MOFERT, which had the power to interpret it, later released an interpretation notice to its article 24, which has the same legal effect as IPFTAS itself.[55]

Because of China's foreign trade operation permit system, many domestic enterprises that are without a foreign trade operation permit, cannot sign a foreign trade contract in their names. If they do so, the foreign trade contract signed in their own names would be void.[56] Therefore, these enterprises have to entrust the foreign trade operators to make contracts with foreigners on their behalf. However, GPCL is silent in regards to the common practice where the enterprises entrust the foreign trade operators to act in the latter's name. IPFTAS was thus designed to fill in the gap in Chinese foreign trade agency law.

IPFTAS provides that when an operator entrusted by a principal with a foreign trade operation permit deals in the principal's name, GPCL applies.[57] It further provides that when a foreign trade operator entrusted by other enterprises or individuals deals with foreign trade in his own name, IPFTAS then applies.[58] IPFTAS

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[55] *The Interim Provisions of Foreign Trade Agency System*, art. 26.
See online <http://comlaw.myrice.com/fagui/waimaodaili.htm > (Date accessed: December 24, 2001).

[56] See Zhong Jianhua & Yu Guanghua, "China's Uniform Contract Law: Progress and Problems", 17 UCLA Pacific Basin L.J. 1 at 17.

[57] *The Interim Provisions of Foreign Trade Agency System*, art. 1.

[58] *Ibid*, art. 2.

was developed as a supplement to GPCL. However, because of its legal efficacy,[59] the implementation of IPFTAS has created many problems and confusions, which will be discussed in the following part of this thesis.

According to IPFTAS, an agency contract is the fundamental source of the rights and obligations between principals and agents.[60] IPFTAS provides that the agency contract must be in writing and should contain certain conditions, including the proxy term, the scope of authorization, rights and duties of two parties and their responsible expenses, avenues of dispute resolution and when the agency expires.[61]

Chapter 2 of IPFTAS deals with the rights and obligations of the principal. The principal should go through the formalities for the entrusted matter in accordance with the national laws and rules concerned,[62] and should inform the agent in detail of the related information about the merchandise imported or exported.[63] Besides these duties, the principal should perform his obligations according to the agency contract and the foreign trade contract, including offering the required fund or merchandise to the agent for import or export.[64] One of the principal's important obligations is that he should

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[59] For the uncertain legal efficacy of administrative regulations in the Chinese legal system, see Chapter 1, Section 1.3.2.

[60] *The Interim Provisions of Foreign Trade Agency System*, art. 4.

[61] *Ibid*, art. 5.

[62] *Ibid*, art. 6.

[63] *Ibid*, art. 7.

[64] *Ibid*, art. 10. Agency contract is different from foreign trade contract. The former one, as stated in article 4, is a contract made by the principal and the agent. The foreign trade contract, in the foreign trade agency system, refers to the contract signed between the agent and the foreign party. Whether the principal is mentioned in the foreign trade contract, depends on the terms of a particular contract. From article 1 and 2, IPFTAS only regulates one kind of foreign trade contracts in which the foreigners do not

give the agent the remuneration fixed in the agency contract and refund him all expenses, tax and interests. The remuneration is based on the total value of the foreign trade contract multiplied by the arranged rate.[65] If the foreign trade contract cannot be wholly or partly performed, or if the performance is delayed or in non-conformity with the foreign trade contract, due to the breach by the principal, the principal must compensate all the expenses, tax, interests paid by the agent in advance, pay him the arranged remuneration and eventually assume all the liabilities to the foreign parties.[66]

With respect to a foreign trade contract, the principal cannot give any offer or acceptance directly to a foreign party, even though he may be allowed to attend the negotiation with the foreign party. Furthermore, he cannot make any acceptance regarding the contract in any manner.[67] Nor can he amend or change the foreign trade contract directly with the foreign party. Any supplement or amendment to the contract agreed to by the principal and the foreigner is invalid.[68] Therefore, the principal is completely exempted from the bargain with the foreign party and from the conclusion of foreign trade contract, although he is the end seller or buyer. As long as the principal has agreed upon the import or export contractual term, he cannot claim

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know the principals when entering into the contract with the agents who make the contract in their own names.

[65] *Ibid*, art. 13. In China, foreign trade operators, as agents, are only entitled to remuneration usually only as 3% of the total trade amount or less. See *the Notice to the Interpretation of the IPFTAS*, art. 24, issued by MOFERT.

[66] *Ibid*, art. 11.

[67] *Ibid*, art. 8, section 1.

[68] *Ibid*, art. 9.

compensation from the agent for any loss caused by defect in this term.[69]

Corresponding to chapter 2, chapter 3 of IPFTAS relates to the rights and obligations of the agent. The fundamental principle of this chapter is that the agent enjoys the contractual rights and takes the contractual obligations directly to the foreign party.[70] Pursuant to IPFTAS, the agent shall make the foreign trade contract in his own name with a foreigner in light of the agency contract and then deliver to the principal a duplicate of the contract on time. Meanwhile, the agent shall obey the laws, rules and other foreign trade regulations when acting upon the entrusted matter. It is the agent who has the duty to assure that the import and export contract observes Chinese law, accords with international customs, and safeguards the principal's interests.[71] The agent shall inform his principal of the quotation of the entrusted merchandise in the international market and shall report to his principal the performance of the contract.[72]

If the agent does not perform his obligations in accordance with the agency contract and therefore breaches the foreign trade contract, he shall compensate the principal and take all the responsibilities to the foreign party.[73] If it is the foreign party whose fault leads to the failure of the foreign trade contract's performance, the agent shall claim

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[69] *Ibid*, art. 8, section 2.

[70] *Ibid*, art. 15.

[71] *Ibid*, art. 16.

[72] *Ibid*, art. 17.

[73] *Ibid*, art. 19.

compensation in time against the foreigner on the basis of the foreign trade contract and the related terms in the agency contract or secure other remedies.[74] Meanwhile, the principal shall assist the agent in preparing necessary documents for claim. The agent, subsequently, should notify him concerning the process of claim and transfer the compensation received.[75] Pursuant to the principle "the agent bears the contractual obligations and enjoys the contractual rights",[76] the agent shall assume all the losses when his fault causes the failure of claim. However, the principal cannot ask the agent for any compensation other than the actual amount given by the foreigner. If it is the principal's fault that causes the failure of claim, then the principal should bear the losses assumed by the agent first.[77]

Chapter 4 of IPFTAS provides for the post-contract dispute resolution. Generally, it is consistent with "one shall bear the loss due to his fault", which has been demonstrated in the preceding chapters. The principal and the agent may agree that the agent has the obligation to claim suit or arbitration under the premise of the principal's consent and assistance. The loss or benefit caused shall be ultimately imposed on or conferred to the principal. If the agent has agreed but later refuses or delays to bring suit or arbitration, the principal is entitled to claim his loss against the agent.[78]

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[74] *Ibid*, art. 20.

[75] *Ibid*, art. 23.

[76] *Ibid*, art. 15.

[77] *Ibid*, art. 23.

[78] *Ibid*, art. 24.

• ***Foreign Trade Law***

MOFERT intended to fill the legal vacuum of the foreign trade agency system left by GPCL through the promulgation of IPFTAS. However, as an administrative regulation, IPFTAS does not function as legally binding as law does, which makes the practice of foreign trade agency in China uncertain.[79] As a result, in 1994, the Foreign Trade Law was proclaimed by the Standing Committee of the NPC as a special law laying out the basic principles of China's foreign trade in goods, technologies and services with a view to developing China's foreign trade, maintaining the foreign trade order and promoting a healthy development of the socialist market economy in China.[80]

FTL spells out the most detailed regulations with respect to the qualification of foreign trade operators.[81] Besides the state-owned enterprises with a foreign trade operation permit, foreign-invested enterprises can automatically obtain a permit to import non-productive articles for their own use and to export their product according to foreign investment laws. FTL states that foreign trade operators should legally manage themselves and should assume sole responsibility for their profits or losses.[82]

Unprecedentedly, FTL affirmed the foreign trade agency system into Chinese law through article 13, which provides that "[a]ny organization or individual without a

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[79] *Supra* note 59. For more critical analysis of the uncertainty aroused by IPFTAS, see Chapter 3.

[80] See *the Foreign Trade Law of the PRC*, art.1, 2. The FTL was adopted at the Seventh session of the Standing Committee of the Eighth NPC and promulgated on May 12, 1994.

[81] See note 28.

[82] See *the Foreign Trade Law of the PRC*, art. 11.

foreign trade operation permit may entrust a foreign trade dealer located in China as its agent to conduct its foreign trade business within the business scope of the latter". Therefore, not only those enterprises that have a permit may entrust foreign trade operators as their agents, which is defined in GPCL, but the enterprises without a permit may also deal in international trade through foreign trade operators by agency as defined in FTL.

FTL stipulates that the entrusted foreign trade operator shall provide the principal with actual business information, such as the market situation, commodity prices and the client's position. Furthermore, they should enter into an agency contract in which the rights and obligations of both parties should be specified.[83] Lamentably, FTL does not give any further regulations regarding the foreign trade agency system either on the concept of agency or on the rights and obligations of parties.

- ***Contract Law***

The unified Contract Law of the PRC was passed by the Second Session of the Ninth NPC on March 15, 1999 and became effective on October 1, 1999. Before its birth, there were three Chinese statutes regulating contracts: Economic Contract Law, Foreign Economic Contract Law and Technology Contract Law, each of which has its own sphere of application. However, the promulgation of new Contract Law unified the three laws and ended "the practice of treating domestic and foreign contracts differently".[84]

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[83] *Ibid*, art. 13, section 2.

[84] Wei Luo, *The Contract Law of the People's Republic of China: with English Translation and Introduction* (Buffalo: William S. Hein & Co., 1999) at 11.

The Contract Law comprises two parts besides the Supplement: General Principles and Specific Provisions dealing with fifteen standard contracts, such as sales contracts, contracts for loans, contracts of leasing etc. In the General Principles, legitimacy, one of the fundamental principles of the Contract Law, requires that the contracts entered by the parties should abide by the laws and administrative rules.[85] Otherwise, they are void.[86] However, since IPFTAS does not belong to laws or administrative rules, therefore from the letters of the Contract Law, the foreign trade contracts are not required to be in accord with IPFTAS.

The General Principles of the Contract Law also provide two provisions concerning ratification of agency and apparent agency. A contract concluded in a person's name who lacked agency authority, or who acted beyond his agency authority, or whose agency authority was extinguished, is not binding upon the principal unless ratified by him. Without ratification, the performing person is liable for his acts. Prior to ratification of the contract, the other party, in good faith, is entitled to cancel the contract. Cancellation will take effect through notification sent to the counterpart.[87] However, when a contract has been made in a principal's name by a person lacking agency authority, or acting beyond his agency authority, or whose agency authority has been extinguished, and if it is reasonable for the other party to believe that the performing person had agency authority when entering into the contract, then the

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[85] *The Contract Law of the People's Republic of China,* art. 7.

[86] *Ibid,* art. 44.

[87] *Ibid,* art. 48

contract is valid and also binding to the principal.[88]

In the Specific Provisions part of the Contract Law, three kinds of contracts relating to agency are provided for: consignment contract, trading agency contract and brokerage contract.[89]

A consignment contract is defined as a contract in which a consignor allows the consignee to handle his matters.[90] Therefore, a consignment contract, when the matter concerned is involved with a third party, is an agency contract.[91] Chapter 21 of the Contract Law provides eighteen provisions on the consignment contract, some of which dealing with the relationship among consignor, consignee and third party are introduced for the first time into Chinese law from Western legal systems. Article 402 says that when the consignee enters a contract with a third party on his own behalf, if the third party is aware of the agency relationship when entering the contract, both the consignor and the third party shall be bound by such a contract unless there is

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[88] *Ibid*, art. 49.

[89] In some articles, the consignment contract is translated as agency appointment contract or entrustment contract. The trading agency contract is translated as trading-trust contract or contract on commission. Here the author adopts the translation in Wei Luo, *supra* note 84. Whether the relationships regulated by these three contracts all belong to agency is still arguable. See Chen Jiang, "The Improvement and Drawbacks of China's Foreign Trade Agency after the New Contact Law Put into Effect" (2001) 3 International Trade Matters (*Guoji Maoyi Wenti*) 62 at 63. Chen Lihu, "An Ustic Opinion of Foreign Trade Agency System of China" (2000) 2 Suzhou University Journal 64 at 66-67. Hu Chongshi & Deng Dexiong, "Study on Some Legal Problems of Foreign Trade Indirect Representative" (1998) 3 Xiamen University Journal 69 at 70. Su Haoming & Xu Jiaxian, "On Foreign Trade Brokerage Contracts" (1997) 1 International Trade Matters 47 at 48.

[90] *The Contract Law of the PRC*, art. 396.

[91] Because a consignment contract is not always involved with a third party, it is not identical to the agency contract, which is necessarily involved with three parties: principal, agent and third party. Therefore an agency contract must be a consignment contract. However a consignment contract may not be an agency contract. For discussion about this, see Chapter 3, s.3.4.

substantial evidence to prove that such a contract only binds the consignee and the third party.[92] Compared with the previous regulations concerning the foreign trade agency provided in GPCL and IPFTAS, this rule is substantially different, a difference that will be discussed hereafter.

Furthermore, article 403 adopts another common law concept called "undisclosed agency", i.e. the contract made by the consignee binds the consignor even though the third party is not aware of the agency relation between the consignee and consignor when he enters into the contract with the consignee. The Contract Law provides that the consignee should disclose the agency to the third party if the consignee fails to fulfill his obligations due to the responsibility of the consignor. Therefore, the innocent third party can choose either the consignee or the consignor against whom he will claim his rights.

On the other hand, the Contract Law confers on the innocent consignor the right to exercise directly against the third party. Where the third party selects the principal as the other party to the contract, the principal may avail himself of any defense he has against the agent as well as any defense the agent has against the third party. Therefore, the Contract Law vests the principal with an intervention right and the third party with an option right, which never appeared in Chinese laws before.[93]

Chapter 21 also provides some regulations with respect to the rights and obligations of the consignor and consignee. The consignor must prepay the expenses

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[92] *The Contract Law*, art. 402. See Wei Luo, *supra* note 84.

[93] See Fu Jinyan, *supra* note 22.

for handling the entrusted affair, and any expense necessary for the affair advanced by the consignee must be repaid with interest.[94] After the consignee completes the entrusted affair, the consignor shall pay him the remuneration. If the agency contract is terminated or the entrusted affair is not capable of being completed due to any reason not attributable to the consignee, the consignor shall pay him an appropriate amount of remuneration unless they have agreed otherwise.[95]

In addition to these stipulations, in the course of handling the entrusted affair, if the consignee sustains any loss due to a reason not attributable to himself, the consignee may seek indemnification from the consignor.[96] On the other hand, the consignee shall act in accordance with the instructions of the consignor. Any required deviation from the consignor's instructions is subject to consent by the consignor.[97] The consignee shall report to the consignor the progress of the entrusted affair.[98] Any property acquired by the consignee when dealing with the entrusted affair should be transferred to the consignor.[99] If the consignor sustains any loss due to the fault of the consignee, the consignor may claim damages against him.[100]

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[94] *The Contract Law of the PRC*, art. 398.

[95] *Ibid*, art. 405.

[96] *Ibid*, art. 407.

[97] *Ibid*, art. 399.

[98] *Ibid*, art. 401.

[99] *Ibid*, art. 404.

[100] *Ibid*, art. 406.

Chapter 22 of the Contract Law is on the trading agency contract, which is defined as a contract in which a trading agent conducts trading business for his client in his own name and his client compensates him.[101] It is seemingly similar to the agency contract in the common law.[102] However, according to the Contract Law, when a trading agent enters a contract with a third party, the trading agent shall enjoy the rights and bear the obligations under such a contract, which differs from the agency stated in common law systems.[103] In a trading agency contract, when the agent has completed or partly completed the entrusted affair, the principal shall pay the corresponding remuneration thereto. If the principal fails to pay, the agent is entitled to a possessory lien on the trust item, unless they agree otherwise.[104] A matter not provided in chapter 22 shall be governed by the relevant provision provided in chapter 21.[105] Nonetheless, article 403 of chapter 21 does not apply to the trading contract.[106]

The brokerage contract is regulated in Chapter 23 of the Contract Law. It is stated that a brokerage contract is a contract in which a broker presents his client with an opportunity to enter a contract or to provide brokerage services for entering contracts, and his client compensates him.[107] Whether the brokerage contract can be included

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[101] *Ibid*, art. 414.

[102] This will be discussed in Chapter 3 of this thesis.

[103] *Ibid*, art. 421.

[104] *The Contract Law of the PRC*, art. 422.

[105] *Ibid*, art. 423.

[106] See Wu S. & Tuo J., *supra* note 39.

[107] *Ibid*, art. 424.

into agency is of debate, and will be discussed later.[108]

Characterized as "incorporated with many of contract principles and legal terms of civil law, some of the contract principles of common law, and some terms used in the United Nations Convention on the International Sale of Goods and in the American Uniform Commercial Code",[109] the new Contract Law contributes to the development of Chinese law, while, however, containing ambiguities too.

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[108] See Chapter 3.

[109] Wei Luo, *supra* note 84.

CHAPTER 3

ANALYSIS OF CHINESE FOREIGN TRADE AGENCY LAW

Introduction.

This chapter presents a critical analysis of current Chinese foreign trade agency law. Scattered among the four legal sources that were promulgated in different eras and under different backgrounds, Chinese foreign trade agency law appears inconsistent and fragmented. Some of the problems in this legal regime can be traced to the adoption of inconsistent rules of agency from both civil and common law systems, which differ significantly. Besides these problems, several aspects of Chinese foreign trade agency law are in urgent need of reform and significant lacunae exist in current law.

3.1 Conflicts Arising from the Influence of Civil Law and Common Law

3.1.1 Conflicting Definitions of Agency in Chinese Foreign Trade Agency Law

Affected by the nature of foreign practice, China's foreign trade legal system is more reflective of foreign norms than are other legal domains involving domestic relationships.[1] As examined below, Chinese foreign trade agency law has borrowed legal norms from both civil law and common law systems. Although the practice of borrowing foreign norms has been a normal practice internationally, the process of convergence merits close attention when transplanting different systems into one.[2] This is also an important issue when studying the definition of agency in Chinese foreign trade agency law.

The concept of agency provided in the various legal sources of Chinese foreign trade agency law is vague and conflicted. As will be revealed, the definitions of agency in the General Principles of Civil Law (hereinafter "GPCL"), the Foreign Trade Law (hereinafter "FTL") and the Interim Provisions of Foreign Trade Agency System (hereinafter "IPFTAS") assimilated the terminology of representation from civil law systems, while the definition of agency in the Chinese Contract Law was developed from the common law of agency. This inconsistency between representation in civil law systems and agency in common law systems leads to the conflicting definitions of agency provided in Chinese foreign trade agency law.[3] It is

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[1] Pitman B. Potter, *The Chinese Legal System* (London: Routledge, 2001) at 134.

[2] Jeffrey S. Lena & Ugo Mattei, eds., *Introduction to Italian Law* (Hague: Kluwer, 2002) at 30.

[3] For better understanding, in this thesis, "agency" is used as generalized terminology, one comprising the meaning of "representation" in civil law systems.

arguable whether *representation* is equivalent to *agency* as implemented in common law countries.[4]

3.1.1.1 The Concept of Representation and the Influence of Civil Law

Representation is a basic term employed in the legal domain of agency by civil law countries.[5] Defined as "a declaration made by one, within the delegated authority in the name of his principal, results directly for and against the principal", [6] representation in civil law systems is a mechanism allowing a person to execute a juridical act that directly produces its effects in respect of another.[7] In the civil law

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[4] Some works state that representation and agency are identical. See Michael B.North, "Comment: Representation, Mandate, and Principles of Agency in Louisiana at the Turn of the Twenty-First Century" 72 Tul. L.Rev. 279 at 282. However, others do not agree and argue that there are differences between these two notions, for example, in the volition dependence, the extent of control of representative, and the extent of delictual liability. See Wendell H. Holmes & Symeon C.Symeonides, "Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law" 73 Tul. L.Rev. 1087 at 1097.

[5]The law of agency was absent from the early civil law systems, because it was contrary to the Roman maxim "*alteri stipulari nemo potest*", which means "nobody can stipulate for another". Considered to violate the fundamental principle of personal autonomy, the concept of agency was not substantially developed in the early Roman law system. Only a few cases involving intermediaries were comparable to the direct representation provided in the contemporary sense. This conception, however, has been abandoned in the present civil law. See Floyd R.Mechem, *A Treatise on the Law of Agency*, 2nd ed. (Buffalo: William S.Hein, 1982) at 6. H.L.E.Verhagen, *Agency in Private International Law* (Hague: Martinus Nijhoff, 1995) at 14. In the civil law countries, the rules of representation apply not only to commercial law, employment law and competition law, but also apply so far as they are not expressly excluded or overridden by conflicting rules. See Fritz Staubach, *The German Law of Agency and Distributorship Agreement* (London: Oyez, 1977) at 3-5.

[6] *German Civil Code*, art. 164. For the text of German Civil Code, see *The Civil Code of the German Empire*, trans. by Walter Loewy (Colorado: Fred B. Rothman & Co., 1997).

[7] Verhagen, *supra* note 5 at 9. Besides representation, the civil law of agency implements some other concepts. "*Agenzia*" in the Italian Civil Code refers to one party who undertakes on a continuing basis in return for remuneration the duty of negotiating contracts for the account of another person within a specified territory. In the Italian law, the *agente* is also called as a commercial representative. See *Italian Civil Code, the Italian Law of March 12, 1968 (No. 316) as amended by the Law of July 28, 1971 (No. 559), Italian Decree of April 12, 1969.* The concept of "*mandato* (mandate)" is another common notion in this area. In the mandate contract, one party, i.e., the mandatory, binds himself to accomplish one or more legal transactions for the account of another, i.e., the mandator. See *Italian Civil Code*, art. 1742. For the text of Italian Civil Code, see *The Italian Civil Code*, trans. by Mario Beltramo, Giovanni E. Longo & John Henry Merryman (N. Y.: Oceana, 1969).

systems, representation was initially involved in civil transactions and was divided into direct and indirect representation.[8] In direct representation, the direct representative acts in the name of his principal, or at least, discloses the existence of the principal to the third party when transacting with the latter. The contract that the direct representative enters into binds the principal directly to the third party, while the direct representative is freed of the contract. In contrast to the direct representative, the indirect representative makes the contract in his own name and is construed as a real party to the contract. Therefore, he is held to account for the results of his acts to the third party and internally, is entitled to demand reimbursement from the principal.[9]

Direct representation, a typical case of agency in civil law, is embodied in the concept of agency provided in GPCL. GPCL, as the basic civil law in China, requires the agent to perform civil juristic acts in the principal's name within the scope of the power of agency.[10] In other words, agency, pursuant to the term in GPCL, is a relationship where the agent performs civil juristic acts in the principal's name with the authority entrusted by the latter. Where a person acts in his own name, then according to this definition, regardless whether he acts on behalf of the other person, the relationship between him and the other person cannot be an agency. In such cases the actor is construed as an independent party and has to assume the obligations and

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[8] See S.J. Stoljar, *The Law of Agency* (London: Sweet & Maxwell, 1961) at 12.

[9] Mechem, *supra* note 5 at 3.

[10] See *the General Principles of Civil Law of the PRC*, art. 63.

enjoy the rights created by his act on his own without any remedies from the party for whom he is acting. Furthermore, GPCL requires that the party must have competent civil capability to exercise corresponding civil acts.[11] In the case of agency, the principal is required to be competent for the entrusted matter. Otherwise, pursuant to GPCL, his entrusting act will be void.

Because of the legal efficacy of GPCL, these rules have the highest authority in defining agency in the Chinese legal system. However, when the concept of agency as defined in GPCL is applied to foreign trade, problems arise. As stated above, because of the strict foreign trade operation permit system, there are three forms of agency in China's foreign trade practice. Firstly, a foreign trade operator may act for an enterprise with a permit in the enterprise's name. Secondly, a foreign trade operator may act in his own name for an enterprise with a foreign trade operation permit. Lastly, a foreign trade operator may act in his own name for an enterprise without a permit. The definition of agency in GPCL only covers the first of the three forms mentioned above. The next two forms of agency do not fulfill the requirements stipulated in GPCL that the agent is required to act in the principal's name, and that the principal should be competent for the entrusted matter.[12] Therefore, the final two forms of agency cannot be legally supported by GPCL.[13] As a matter of practice, the

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[11] See *the General Principles of Civil Law of the PRC*, art. 55.

[12] As analyzed in Chapter 2, most Chinese enterprises do not have the right to deal in foreign trade directly with foreign parties because of the foreign trade operation permit system. Therefore, pursuant to article 55 of GPCL, they are not competent to entrust others to be their agents.

[13] See Lan Tian, "Discussion of the Legal Problems of Chinese Foreign Trade Agency" (2000) Vol. 17, No.4, Journal of Xingtai Vocational and Technical College at 52.

exploitation of the first form of agency is only "marginal"[14] in China's foreign trade practice, for most Chinese enterprises do not have foreign trade operation permits.[15]

To solve the problem of incompatibility between the legal rules in GPCL and common practice, IPFTAS and FTL, proclaimed after GPCL, provide the agent an alternative to act in his name for the principal without a foreign trade operation permit. Therefore, the enterprise without a foreign trade operation permit, pursuant to IPFTAS and FTL, is entitled to entrust the operator to act in the latter's name with foreign parties.[16] It is further provided that the agent, once acting in his own name, is a party to the contract unless he transfers the contractual rights and obligations to the principal.[17] The concept defined above in FTL and IPFTAS isolates the principal from the external relationship between the agent and third party, which is a key characteristic of indirect representation in civil law systems.

3.1.1.2 The Concept of Agency and the Influence of Common Law

In contrast with the aforementioned concepts of agency influenced by civil law systems, the new Contract Law adopts a concept of agency derived from common law systems.[18] In the common law systems, agency, etymologically, means an actor,

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[14] Guanghua Yu & Minkang Gu, *Laws Affecting Business Transactions in the PRC* (Hague: Kluwer, 2001) at 228.

[15] For discussion of China's foreign trade operation permit system, see Chapter 2, ss.2.1.

[16] See *Foreign Trade Law*, art. 13. *The Interim Provisions of Foreign Trade Agency System*, art.2.

[17] *The Interim Provisions of Foreign Trade Agency System*, art. 15.

[18] In early common law, agents first appeared under the general head of servants and the first precedents set for the law of agency were cases involving master and servant. In the United Kingdom, the origin of the law of agency is immediate to the time of Edward I. At that time, the King issued letters of credit "empowering his agents to borrow money and to promise repayment in his name". See Mechem, *supra* note 5 at 5. It was in the late eighteenth century and the early nineteenth century (some

a doer, or a force which accomplishes things. However, agency nowadays represents the taking up of the relation, assumption of the condition, or fact of being the actor.[19] More specifically, agency is a fiduciary relation involving two persons. One is called the principal; who expressly or impliedly consents that the other person should act on his behalf so as to affect his relations with a third party. The other is called the agent, who consents to act so or so acts.[20]

According to the fundamental maxim for agency in common law systems "*Qui facit per alium facit per se*",[21] the agent, no matter whether he acts in his name or his principal's name, binds and entitles the principal to the contract made by him and the third party.[22] Identically, the Contract Law of the PRC stipulates that when the agent acting within the scope of authority granted by his principal enters into a contract in his own name, the contract is directly binding upon the principal and the third party,

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scholars think the origin should be set in the nineteenth century) that the law of agency developed with many of the principles finding application then still active today. See Stoljar, *supra* note 8 at 14. Gerard McMeel, "Philosophical Foundations of the Law of Agency" (2000) Vol. 116, Law Quarterly Review 387 at 387. In step with the economic development at and since that time, agency had been increasingly applied, with the intention of fulfilling the strong demand of corporations and other commercial organizations. Businesspeople employed the services of factors, brokers, and the like to help them achieve success in their own business. Since its birth, the law of agency has presented many peculiar principles that cannot be justified by the customary theories. Undisclosed agency, as revealed later, is a good example.

[19] See Floyd R. Mechem, *supra* note 5 at 5, 6. There was a proposition in the common law that representation should be used as the generic term, and the contractual and non-contractual species should be named as agency and service respectively. However, it is not accepted in the common law and the boundary of this classification is vague.

[20] See F.M.B.Reynolds, ed., *Bowstead and Reynolds on Agency*, 6th ed. (London: Sweet& Maxwell, 1996). This definition resembles that in *American Restatement of the Law of Agency*, Vol.1 (St. Paul: American law Institute, 1958) at 7.

[21] This means he who acts through another acts in person. See Ernest W. Huffcut, *Elements of the Law of Agency* (Washington D.C.: BeardBooks, 1999) at 3.

[22] See *Bowstead & Reynolds on Agency*, *supra* note 20 at 361.

except where there is conclusive evidence establishing that the contract is only binding upon the agent and that third party.[23]

Heavily influenced by common law of agency, the concept of agency provided in the Contract Law empowers the agent who has acted in his own name to free himself from the contract with the third party and therefore agency exceeds the limitation of representation that otherwise restrains the agent to the contract he makes in his own name. This is a breakthrough with respect to the definition of agency in the Chinese legal system.[24] However, it is essentially inconsistent with the concepts defined in GPCL, FTL and IPFTAS.

3.1.2 Conflicting Modes of Classification of Agency

The differing definitions of agency employed in Chinese law generate differing modes of classifying agency. It is useful to examine these different modes of classification, leading as they do to substantively different rules on rights and obligations for agency parties. As stated above, GPCL, FTL and IPFTAS adopt the concept of representation from civil law systems, which is further divided into direct

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[23] *The Contract Law of the PRC*, art. 402, 403. However, the law does not provide for what can be construed as conclusive evidence, which gives rise to much uncertainty. Since the Contract Law was enacted not long ago, the Supreme Court of the PRC needs to make legal interpretations qualifying these opaque terms for the ensuing legal practice.

[24] It stipulates that Chapter 21 of the Contract Law has introduced the intervention right for the principal and the election right for the third party by the studies from common law of agency and international conventions. See Wu Shuangquan & Tuo Jianfeng, "Contract Law-Improvement of Agency Relations and Foreign Trade Agency System" (2001) Vol. 29, No. 3, Journal of Lanzhou University 94. However, some argue that the idea of the Contract Law of the PRC is not as same as agency in the common law countries, because the Contract Law does not explicitly state that the contract made between the agent and third party is equivalent to the contract made between the principal and third party. The holders of this opinion further say that the Contract Law only provides procedural remedies for the parties concerned. See Fu Jinyan, "A Study on the Effects to China's Foreign Trade Agency System Caused by the New Contract Law", Vol. 182, 5 Finance and Trade 43. In my view, such an interpretation of provisions regarding agency in the Contract Law continues to adhere to the concept of representation. See *the Contract Law of the PRC*, art. 402.

and indirect representation, based on whether the agent acts in his principal's name or in his own name.

Conversely, the Contract Law adopts a different mode of classification, one that is similar to that of the common law. In common law systems, agency is primarily classified into two categories according to the principal's status *vis-à-vis* the third party when the latter enters into the contract. A first category is the "disclosed principal" which can be further divided into two cases, i.e. the named principal and the unnamed one. In the case of a named principal, the principal's identity is known to the third party when making the contract. In the case of an unnamed principal, the principal's existence is known to the third party when making the contract, but the agent does not reveal the principal's name to the third party.

In contrast to the disclosed principal, the common law defines a class of "undisclosed principal". In the case of an undisclosed principal, the agent concludes the contract with the third party with an intention to act on behalf of his principal,[25] while the existence of a principal behind the agent is unknown to the third party who believes that he is dealing with the agent personally when he concludes the contract with the agent.

Although the Contract Law of the PRC does not provide the same terms as "named", "unnamed" or "undisclosed" principal in its provisions, the rules stipulated in the law demonstrate that the Contract Law introduces the concepts of "disclosed

[25] *Siu Yin Kwan v. Eastern Insurance Co. Ltd.* [1994] 2 WLR 370, 376.

principal" and "undisclosed principal" and thus employs a similar classification as the common law of agency.[26]

The most significant distinction between the classification of agency utilized in common law systems and the classification of representation is that different rules apply when the agent acts in his own name. In common law systems, an unnamed or undisclosed principal can sue and be sued in his name on any contract duly made on his behalf.[27] However, an indirect representative, instead of his principal, is liable to the transaction that he makes in his name.[28] Thus, different modes of classification of agency directly result in the inconsistent provisions on rights and obligations of agency in various legal sources of Chinese foreign trade agency law, as the next section seeks to demonstrate.

3.1.3 Inconsistent Rules on Rights and Obligations of Agency

Rights and obligations are issues of utmost concern to agency parties. However, Chinese foreign trade agency law in this regard is ambiguous and contradictory

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[26] *The Contract Law of the PRC*, art. 402, 403.

[27] The doctrine of undisclosed principal violates a fundamental doctrine of "privity of contract", which states that a contract only creates personal obligations to the contracting parties. See Ernest W.Huffcut, *supra* note 21 at 125. Furthermore, the undisclosed principal violates "some of the basic tenets of the laws of agency". The doctrine of undisclosed principal was heavily criticized as being "anomalous", "unsound", and "unjust". See Marin Schiff, "The Undisclosed Principal: An Anomaly in the Laws of Agency and Contract" (1983), Vol. 88, Commercial L.J. Stoljar, *supra* note 8, at 203. Scholars try to justify the peculiarity of the doctrine with varying arguments. Among these, the equity and commercial utility may provide the best explanations for the prevalence of undisclosed agency. In spite of the peculiarity of undisclosed agency, most common law scholars advocate its retention in the light of its commercial utility. See Randy E. Barnett, "Squaring Undisclosed Agency Law with Contract Theory" (1987) 75 California L.Rev.1969. Warren A. Seavey, *Studies in Agency* (St. Paul: West, 1949) at 87. Furthermore, the unique common law doctrine of undisclosed principal has attracted considerable attention from comparative legal scholars. It has affected other law systems to a certain degree and been accepted into the international conventions. Verhagen, *supra* note 5 at 38.

[28] *The Interim Provisions of Foreign Trade Agency System*, art. 15.

because of its adoption of both civil law rules and common law rules into its legal regime.

The first issue of conflict is whether an agent has a right to act in his own name. GPCL proclaims that the principal shall bear all the consequences of his agent's acts within the authority granted by him. If the agent acts in his own name, he will become a party to the contract unless he delegates all the contractual rights and obligations to his principal. In practice, as stated above, GPCL does not recognize an agency relation when an agent acts in his own name.[29]

However, other legal sources of foreign trade agency law allow the agent to act in his name on the behalf of his principal. With regard to those corporations without foreign trade operation permits in particular, FTL and IPFTAS empower them to entrust the foreign trade operators to become their agents and to act in the latter's names. According to GPCL, which has higher legal efficacy than other legal sources in Chinese foreign trade agency law, the cases defined above in FTL and IPTAS can not be conceived as agency, despite that they in truth comprise agency relationships.

The resultant conflicting issue is whether the agent must be liable to the contract when he acts in his own name with the third party. Pursuant to IPFTAS, which is perceived as the most concrete legal source of Chinese foreign trade agency law, an agent who acts in his own name is deemed a party to the foreign trade contract and, therefore, has to bear the contractual liabilities to the third party. When any post-contract dispute arises, the agent should claim against the third party with the assistance of his principal. Should the agent fail to perform the contract, even when it

[29] See Chapter 2, s.2.3.

is the principal who is at fault for the failure, the agent will be sued directly by the third party for remedies. The principal cannot intervene in the contract made by the agent and third party under any circumstances, though he has an interest in it.[30]

However, the Contract Law, based on its distinct definition and classification of agency developed from common law systems, provides otherwise. It says that, when an agent acts with a third party in his own name, unless there is evidence which proves that the third party was unknowing and would never have entered into the contract had the agency relation between the agent and his principal been known, the contract binds the principal and the third party. When the third party fails to perform his obligations, the agent should disclose the third party to the principal, allowing the principal to exercise the agent's rights against the third party.[31] Furthermore, when the agent fails to perform the contract because of the principal, the agent is also entitled to disclose the identity of his principal to the third party, allowing the third party to select alternatively either the principal or the agent as the other contract party against whom to make a claim.[32]

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[30] As to the provisions of the Interim Provisions of Foreign Trade Agency System, see Chapter 2. However, the Foreign Trade Law is silent with respect to the rights and obligations among agency parties.

[31] In the common law, this is called the principal's right of intervention. The undisclosed principal is entitled to intervention that enables him to acquire the contractual rights and duties directly against the third party unless he is excluded as a party by express or implied terms. He can claim contractual rights to recover money paid or used by the agent, to recover his property, and to recover for torts against the third party. These rights, however, are based on the agent's acts and are limited by them. See Mechem, *supra* note 5 at 1622.

[32] In the common law, this is called the right of election for the third party. The third party is, in the case of undisclosed agency, entitled to a right to choose from the principal and the agent to bear the contractual liability, provided that the existence of the principal is disclosed. However, the third party can only choose one party to bear the liability. Even when the agent and principal are sued jointly, the liability is alternative. Furthermore, once the third party has made the election, it is final and the third

Inconsistency involving rights and obligations of agency not only exists between various legal sources of Chinese foreign trade agency law, but also within single sources. For example, in IPFTAS, article 8 states that, where the principal has agreed to the foreign trade contract, he cannot claim any compensation for loss from the agent due to a defect in the contract. However, article 16 addresses the agent's obligation to ensure that the foreign trade contract is in conformity with current Chinese law and international customs, as well as in the principal's interests.

Since under IPFTAS the principal has neither the right to attend negotiations with the foreign party nor to amend any term of the foreign trade contract, he must put his faith in his agent and accept without bargaining the contract made by the agent. Thus, when the foreign trade contract is found to be defective owing to the negligence of the agent, the question arises whether the principal can recover anything from the agent after he has accepted the contract. The two conflicting provisions in IPFTAS will result in contrary answers to this question, which Chinese legal authorities have not yet resolved.

Conflicting rules in Chinese foreign trade agency law have not only brought about confusion for foreign trade businesspeople,[33] but have also given rise to

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party cannot make a new choice. Nonetheless, in undisclosed agency, the principal will not be discharged unless it is shown that the third party intends to enforce the liability of the agent and will not charge him. See Mechem, *ibid*, at 1333.

[33] Confusion and doubt caused by the inconsistencies in foreign trade agency law promotes sufficient fear in China of unsound and uncertain legal circumstance that Chinese businesspeople are themselves reluctant to implement foreign trade agency. Besides, they argue that the foreign trade agency system is contrary to the decentralization of foreign trade operation right in China. Therefore, most businesspeople choose to establish their own foreign trade departments to deal in foreign trade. See Xin Hong, "Problems Existing in China's Foreign Trade Agency System and the Legal Countermeasures" Vol. 29, 3 Journal of Nanchang University 51. Chen Lihu, "A Rustic Opinion of Foreign Trade Agency System of China" (2000) 2 Suzhou University Journal 64 at 65.

difficulty in decision-making for Chinese courts facing these conflicts.[34]

3.2 Unreasonable Allocation of Rights and Obligations between Agent and Principal

In indirect representation, the agent is usually in an unfavorable position.[35] According to IPFTAS and its interpretation notice, the agent should be responsible for the foreign trade contract, though he is entitled to only a limited remuneration, an amount which will be even more than normally reduced in a highly competitive line of business.[36] The upshot is that Chinese foreign trade operators have to take 100% responsibility in return for 1% of the benefits.[37] Such unreasonable allocations of rights and obligations between the principal and the agent have been sharply

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[34] As pointed out, Chinese foreign trade agency legislation has introduced many difficulties for the courts and arbitration organs involved in solving the disputes regarding foreign trade agency. See also Chen Lihu, *ibid.* Academy of Chinese Foreign Economy and Trade University, "The Existing problems in the Foreign Trade Agency System and Suggestions" (1997) 4 International Trade Matters 19 at 20. Sometimes, different courts implement different methods when hearing similar cases. For instance, if a foreign trade corporation does not want to launch a claim against a third party who is in breach of a foreign trade contract, then the principal sues the foreign trade corporation for breach of the agency contract. Against these facts, some courts choose to include the third party into the litigation, while others only consider the principal and the agent as litigation parties. In the first case, the litigation will be involved with foreign elements and such issues as jurisdiction and applied law will arise. However, in the latter case, it is merely a domestic dispute. Different decisions will be made based on these different methods utilized by courts. Till now, there has not been a uniform opinion as to these differences made by courts concerning foreign trade agency. See Li Qunxing, "Several Issues when Hearing the Cases of Foreign Trade Agency Disputes" (1995) 5 *Faxue Pinglun* 73 at 74.

[35] See Wu S. & Tuo J., *supra* note 24.

[36] In China, foreign trade operators, as agents, are only entitled to remuneration of 3% or less than 3% of the total trade amount. See *the Notice to the Interpretation of the IPFTAS.*

[37] See also Lihu Chen, *supra* note 33 at 65. Su Haoming & Zhu Jiaxian, "On Foreign Trading Agency Contract" (1997)1 International Trade Matters 47 at 49. Chen Jiang, "The Improvement and Drawbacks of China's Foreign Trade Agency after the New Contract Law Put into Effect" (2001) 3 International Trade Matters 62 at 63.

criticized by foreign trade dealers for a long time.[38] The imbalance of benefits and risks for foreign trade operators, to some extent, confines the further development of Chinese foreign trade agency system.

While foreign trade operators complain about the unreasonable allocation of rights and obligations, the principals are also not satisfied with the rules provided in Chinese foreign trade agency law. One of the chief sources of dissatisfaction is that under IPFTAS, the principal cannot claim his rights against nor perform his obligations directly for foreign parties.[39] Although the new Contract Law confers on the principal a right to intervene in the contract, this right only arises when the agent discloses the principal.[40] Therefore, if the agent is remiss in performance or becomes insolvent, the principal has no way to protect his interest unless there is evidence to prove that the foreigner knew of the agency relation when he made the contract.[41] These rules isolating the principal from the relationship between the agent and the third party make for an expensive enforcement of the foreign trade contract, which does not conform to efficiency, one of law's values.[42]

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[38] See Lan Tian, *supra* note 13.

[39] See Guanghua Yu, *supra* note 14 at 232.

[40] *The Contract Law of the PRC*, art. 403.

[41] Huang Hui, "An Inquiry of Chinese Foreign Trade Agency Law" (April 1998) Journal of Fuzhou University. Lan Tian, *supra* note 13.

[42] Guanghua Yu, *supra* note 14 at 228.

3.3 Problems of Formation of Agency

3.3.1 Authority of Agency

Acting on behalf of another person is an essential characteristic of agency, distinguishing it from other agreements such as a distributorship agreement, a licensing agreement, or a franchising agreement.[43] The authority invested in the agent, therefore, is the legal basis of the agent's capability to dispose of his principal's property and rights.[44]

GPCL and the Contract Law provide for the authority of agency in a way similar to that recognized under both common law and civil law systems.[45] Pursuant to GPCL, agency can be made by authorization from the principal, or by exercise of law,

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[43] H.L.E.Verhagen, *supra* note 5 at 1.

[44] Paul Laband first observed that an agent's power to affect relations between the principal and the third party must be distinguished as an independent abstract concept from the contract underlying that power. Furthermore, the relation between the principal and the agent is named the internal relation, while the one between the agent and the third party the external relation. See Michael B.North, *supra* note 4.

[45] In common law systems, the usual mode of investment of the authority is through a unilateral contract established by the principal or, more often, through an agreement between the agent and principal. Moreover, agency may be impliedly created by the conduct of two parties. Besides the authority granted by contract, the authority of agency may be achieved through the ratification of the principal. Agency may be created through estoppel. That is, if a person has allowed another to be his agent either by words or by conduct, thus leading the third person in good faith to deal with another person as his agent, he cannot repudiate the apparent agency if doing so will cause a detriment to the third party. The last category of creation of authority is the operation of law. Under some circumstances, one may be imposed upon with the authority given by law to be an agent for another party when there is no assent between them. This is contrary to the "freedom of contract" slogan, which "has long pedigree in Western politics and philosophy". However, for some good of policy, the law interferes with the freedom of contract and creates what is called "presumed authority". See G.H.L.Fridman, *Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at 51, 111, 120. In civil law systems, there is a division between consensual representation and legal representation. Consensual representation is created through the agreement between the agent and principal. Meanwhile, the authority of legal representation is derived from operation of law or from a court's decision in regards to certain legal relations. See Verhagen, *supra* note 5 at 6-7.

or by designation from the people's courts or the appointing unit.[46] Furthermore, GPCL provides for ratification of agency when the agent acted with no power of agency or beyond the scope of his power of agency.[47] The Contract Law also provides for the ratification of agency[48] in terms that are consistent with the common rules on ratification of agency.[49]

However, rules on authority of agency stipulated in FTL and IPFTAS are incompatible with the rules stated above. In FTL and IPFTAS, the sole of means of foreign trade agency in China is via the investiture of authority of agency by the principal through an agency contract as a sole means of foreign trade agency in China.[50] Considering the legal principle "special law prior to general law", rules in FTL and IPFTAS take priority when applied to China's foreign trade. Compared with the diverse means of authority to generate agency in common and civil law systems, Chinese law on authority of foreign trade agency is stringent and rigid. These rules

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[46] See *the General Principles of Civil Law of the PRC*, art.64.

[47] *Ibid*, art. 66.

[48] *The Contract Law of the PRC*, art. 48, 49. The Contract Law stipulates more detailed provisions on ratification than GPCL, including that the other party to the contract may demand the principal to ratify the contract within one month. Where the principal fails to manifest his intention, he is deemed to have declined to ratify the contract.

[49] In the common law systems, ratification refers to an assent by the principal, either through express terms or through conduct, to an act done by the agent without authority on the principal's behalf so as to bind the principal in a manner as if the authority has been granted in advance. Ratification is not a form of authorization, but it has the same effect as authorization. See *Restatement of Agency*, *supra* note 20 at 210. Three requirements must be fulfilled for a valid ratification: the principal's competent position, the agent's intention to bind the principal, and the principal's acceptance of the act done by the agent within a reasonable time and under the appropriate circumstances. See Fridman, *supra* note 45 at 86-93. In the civil law systems, unauthorized acts of an agent may be ratified by the principal in a way similar to that in common law.

[50] See *Foreign Trade Agency Law*, art. 13. *The Interim Provisions of Foreign Trade Agency System*, art. 3, 4.

restrict the universal application of foreign trade agency in China and furthermore restrain the development of Chinese foreign trade agency system.

3.3.2 Formality of Agency Contract

As stated above, one of the advances GPCL achieved is that it offers the actor options with respect to the formality of his civil juristic act.[51] Applied to agency, GPCL provisions allow agency contracts to be made in writing or orally. The Contract Law, in its provisions of rules regarding formality of agency, adopts a more liberal stance. It says that the contract is not subject to any requirement as to formality and therefore may be concluded by any means, be it in writing, orally or by other means.[52]

Nevertheless, FTL and IPFTAS, taken as special legal sources of Chinese foreign trade agency law, both state that a valid foreign trade agency contract must be in writing.[53] Moreover, they require that foreign trade agency contracts contain terms describing the goods, price, payment, ambit of authorization, remuneration, avenues of dispute resolution, date of expiration of the contract, and like items.[54] In contrast

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[51] *The General Principles of Civil Law of the PRC*, art. 65. A civil juristic act, according to this article, may be entrusted to an agent in writing or orally. Therefore, the parties concerned can choose which form of act they would like to use.

[52] *The Contract Law of the PRC*, art. 10, 11. Pursuant to the Contract Law, a written contract means a memorandum on papers, letters or electronic messages, including telegrams, telexes, faxes, electronic date exchanges and electronic mail postings. Such an interpretation of formality of contract, in line with the electronic commerce emerging around the world, is an advance achieved through the promulgation of the Contract Law. See Zhong Jianhua & Yu Guanghua, "China's Uniform Contract Law: Progress and Problems", 17 UCLA Pacific Basin L.J. 1 at 14.

[53] *Foreign Trade Law of the PRC*, art.13. *The Interim Provisions of Foreign Trade Agency System*, art. 5.

[54] *The Interim Provisions of Foreign Trade Agency System*, art. 5.

with the flexible provisions in GPCL and the Contract Law, these regulations impose strict and onerous obligations on the agency parties dealing in foreign trade in China. Furthermore, they are not consistent with common principles as to the form of agency prevalent in world trade, which balance business flexibility with government intervention.[55]

3.4 Uncertain Application of Chinese Foreign Trade Agency Law

Conflicts generated by the adoption of elements from both representation in civil law systems and agency in common law systems, combined with such inconsistencies in Chinese foreign trade agency law as were reviewed above, have made application of Chinese foreign trade agency law uncertain.

IPFTAS, as enacted by MOFERT, presents the most concrete legal rules on the Chinese foreign trade agency system, particularly on the rights and obligations of the principal and the agent. However, as explained above, many of these provisions conflict with the terms of the Contract Law. According to the legal principle "special law prior to general law", IPFTAS is supposed to take priority over the Contract Law. However, as an administrative regulation, IPFTAS's inferior and non-binding legal efficacy weakens its application and, as a matter of fact, has reduced it to an ineffective law on paper.[56]

Furthermore, GPCL does not recognize agency where the agent acts in his own

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[55] Most common law systems and civil law systems do not provide specified clauses with respect to the form of agency contract. See Mechem, *supra* note 5 at 21. In the Convention on Agency in the International Sale of Goods, the authorization, ratification and termination of authority are not subject to any requirement as to form. See online <http:www.unidroit.org/english/conventions/c-ag.htm> (Date accessed: November 4, 2002).

[56] As to the legal efficacy of administrative regulations in the Chinese legal system, see Chapter 1.

name, a condition which was nonetheless confirmed in FTL, IPFTAS and the Contract Law. It is uncertain which of GPCL or the Contract Law prevails when provisions in these two statutes conflict.[57] How to apply the law in such instances is a challenge which besets Chinese legal authorities.

Uncertainty even arises in the application of a single statute. For instance, the boundary of agency is vague in the Contract Law which provides for three kinds of agency-related contracts: consignment contract, trading agency contract, and brokerage contract.[58] The relationship between these three contracts and agency has not been clarified in the legislation. In the Contract Law, a consignment contract is stipulated as an agency contract and a set of agency rules from common law systems were introduced for it. However, some scholars argue that a consignment contract is not necessarily an agency contract if there is no third party involved with the consignment. They suggest that a consignment contract contains a much broader meaning other than agency, i.e. it covers agency, trading agency and brokerage.[59]

The trading agency contract defined in the Contract Law is contrary to the basic principle of the consignment contract set up in the same statute. In the trading agency contract, the trustee who conducts trading activities shall directly enjoy the

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[57] Some scholars insist that on the basis of the legal principle "special law prior to general law, later law prior to previous law", the Contract Law should prevail in any conflict between it and GPCL. See Han Xiuli, "Paraphrasing Commission Agency" Vol. 16, No.1, Journal of Pengcheng Vocational University 7. But this application would reduce the legal effect of GPCL as the general civil law of China. As the Chinese legal system implements "civil and commercial laws in one", therefore GPCL ought also to govern the foreign trade agency system.

[58] They are respectively regulated in Chapters 21, 22 and 23 of the Contract Law of the PRC.

[59] This idea comes from Roman law. See Xiao Jianhua & Zhao Bin, "Consignment Contract and Agency" 17 Journal of Pinyuan University 1 at 31.

contractual rights and assume the contractual obligations.[60] It is more analogous to the sort of indirect representation provided for in IPFTAS.[61]

In a brokerage contract, a broker offers assistance and service to help his client enter into a contract in return for compensation. Although some scholars understand a brokerage contract to be an agency contract,[62] from my point of view, the broker acts as an independent person rather than as a proxy under the authority of the client and on the latter's behalf.

Since the Contract Law sets out different rights and duties for each of these three types of contracts, the underlying differences between them should be clarified in order to distinguish them.[63] As well, the nature of contracts, be they agency contracts or otherwise, should decide whether the rules of agency apply. However,

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[60] See *the Contract Law of the PRC*, art. 421. As introduced above, in the common law, there is a general maxim as to agency "*qui facit per alium facit per se*", which means "he who acts through another acts in person". This principle is embodied in the provisions for the consignment contract in the Contract Law.

[61] Some scholars contend that chapter 22 of the Contract Law marks the first time that the concept of indirect representation was introduce into Chinese law by. See Wu S. & Tuo J., *supra* note 24. Han Xiuli, *supra* note 57 at 7. However, when analyzed in detail, the trading agency contract does not equal the indirect representation, either. As to the related concepts and rules in the common law and civil law, see ss.3.1 & 3.2 of the thesis.

[62] See M.I.G.F. Kasten, "Explanatory Report of the Hague Convention on the Law Applicable to Agency of 14 March 1978", at 10. Online <ftp://ftp.hcch.net/doc/expl27.pdf> (Date accessed: January 20, 2003). It reads, "The principal instructs the agent to act as his intermediary only to the extent of introducing him to a third party in order to enable him to effect a transaction directly with the third party. All these cases have factual and legal characteristics which justify their treatment as part of the law of agency." German law distinguishes between a notifying broker and a negotiating broker. The notifying broker merely notifies his principal that another person is willing to contract with the principal. The negotiating broker actually settles the terms of the prospect contract by negotiation with the other party. It conceives the broking as a separate system of agency from direct and indirect representation. See Fritz Staubach, *The German Law of Agency and Distributorship Agreements* (London: Oyez, 1977) at 175-177.

[63] For example, in a brokerage contract, a broker is responsible for the expenses of his service, while in a consignment contract, it is the consignor who should pay for the expenses. See *the Contract Law of the PRC*, art. 398, 426.

the line of demarcation of agency is ambiguous in the Contract Law, which leads to the confusion of legal studies and practice.[64]

3.5 Silent Issues in Chinese Foreign Trade Agency Law

Present Chinese foreign trade agency law is silent on many issues in the foreign trade agency area. In GPCL, only certain general principles are stipulated concerning agency. Similarly, although the Contract Law is the most provision-laden of the statutes of the post-Mao era, provisions in respect of foreign trade agency are still limited in number.[65] Within FTL, there are even fewer such provisions. IPFTAS contains the most concrete provisions pertaining to foreign trade agency. However, twenty-six provisions of IPFTAS mainly deal with the internal relationship between the principal and agent. The external relationships of agency, i.e. relationships between the principal and the third party and between the agent and the third party, are poorly provided for in it.

Many further issues receive no mention in Chinese foreign trade agency law. Revocation of authority, effects of termination of foreign trade agency, disqualification from adverse interest of agent, joint principals, standard conduct for

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[64] A good example of the confusion aroused by the conflicting provisions in the laws is provided in the following case analysis in which the author confused the agency relationship with sales relationship. See Rong Min (from the Department of Laws and Regulations in the MOFTEC), "Who is Responsible for the Money Paid in Advance for the L/C?" online <http://www.chinaproducts.com.cn/gb2/content/contf1634.phtml> (Date accessed: January 25, 2002). This article shows that even the Chinese authorities themselves are reluctant to declare the agency relationship in practice.

[65] There are 428 articles in the Contract Law of the PRC. However, there are no provisions in the Contract Law providing for definitions and principles specific to agency in foreign trade.

the principal,[66] how to measure torts committed by agents, limit of principal's right of recoupment, and crime committed by agents, all of these exist as legal lacunae within current Chinese foreign trade agency law.[67] Since statutes are the most important legal source in the Chinese legal system,[68] the number of legal lacunae in Chinese legislation has resulted in a dangerous uncertainty and confusion in practice.

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[66] The principal is also required to maintain a standard of personal and business conduct that will bring no harm to the agent's reputation or reasonable self-respect.

[67] As to the further discussion of these issues, see Mechem, *supra* note 5; *Restatement of Agency*, *supra* note 20.

[68] Despite China's implementation of socialist ideologies, China has enthusiastically followed the civil law traditions since the Chinese legal reform starting at the end of the nineteenth century. In the civil law systems, coded statutes are the major legal source setting out a series of written regulations that judges must follow. Judges are assumed to be mere operators of the legal machine and are actively constrained from interpreting or making laws. See Albert H.Y.Chen, *Law-Making in the People's Republic of China* (Hague: Kluwer, 2000) at 55-69. Hert J. Liebensny, *Foreign Legal Systems: A Comparative Analysis*, 4th ed.(Washington D.C.: George Washington University, 1981) at 7. Conversely, the common law systems, although enacting many more statutes now than previously holds as a basic principle *stare decisis*.

CHAPTER 4

REFORMS TO CHINESE FOREIGN TRADE AGENCY LAW

Introduction:

China's accession to the WTO in 2001 was not only a significant advance towards its full integration into the world economy, but was also an immense challenge, one that would provoke a tremendous impact on China's economic and legal systems. In this chapter, the prospective impact of China's accession to the WTO on Chinese foreign trade agency law will first be scrutinized. Following this, a study of international conventions on agency will be presented, on the basis of which certain reforms to Chinese foreign trade agency law are to be suggested. An important issue that will also be considered is whether China should ratify these international conventions and incorporate them into Chinese law.

Following upon the comprehensive survey and critical examination of Chinese foreign trade agency law undertaken in previous chapters, this chapter will make proposals for practical reforms to current Chinese foreign trade agency law. These reforms are presented in light of common principles of agency dominant in the world, and are designed to harmonize inconsistent regulations, to fill the legal vacuum that exists under the current law, and to encourage a process of reformulation of Chinese foreign trade agency law. All these proposals are expected to continue to reflect the unique context within which Chinese foreign trade agency law developed.

4.1 Impact of China's Accession to the WTO on Chinese Foreign Trade Agency Law

On November 11, 2001, China declared its accession into the WTO following fifteen years of hard negotiation with the then WTO membership. As a milestone in the twenty-first century, accession to the WTO symbolized for China a new era, when it became a recognized player in the global economy.

Pursuant to the Protocol on the Accession of the People's Republic of China to the WTO (hereinafter "Protocol"), upon its accession China would become bound by the WTO Agreement and by its commitments.[1] More specifically, China should fulfill a series of requirements set out in the Protocol as its international duties. Certain of the requirements laid out in the Protocol, such as uniform administration, transparency, non-discrimination and the right to trade, will have a significant impact on Chinese foreign trade agency law.[2]

The CCP leaders agreed that the accession to the WTO should be utilized as a vehicle for China to launch its institutional innovations through implementation of the

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[1] The Protocol states that when China accedes to the WTO Agreement and other Multilateral Trade Agreements annexed to the WTO Agreement, "the obligations in these Agreements that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force." See *Protocol on the Accession of the People's Republic of China to the WTO*, Part I, art.1, 3. The text of Protocol, online < http://www. moftec. gov.cn/table/wto/law02.doc> (Date accessed: January 20, 2003).

[2] Other requirements included in the Protocol on the other issues, such as special trade arrangements, state trading, non-tariff measures, import and export licensing, price control, subsidies, agriculture, technical barriers to trade etc, are also important to China's foreign trade. see *ibid.* However, this chapter only considers the requirements that will have a direct effect on Chinese foreign trade agency law.

obligations set out in the Protocol and other WTO Agreements.[3] Study of the WTO Agreement and of its potential impact on Chinese foreign trade agency system and foreign trade agency law, therefore, should not be overlooked when aiming to initiate reforms in this legal regime.

4.1.1 Free Foreign Trade in China

As discussed in Chapter 2, China's foreign trade system is characterized by "the unusually strict restrictions that Chinese law imposes on the capacity of Chinese enterprises to engage in foreign trade".[4] Because of the limitation of China's foreign trade operation permit system, most Chinese enterprises are deprived of the right to transact foreign trade directly, and this has produced many problems. Consequently, the Chinese government encouraged the implementation of a foreign trade agency system as a fundamental foreign trade principle in order to solve these problems.[5] Enterprises without foreign trade operation permits could entrust as their agent a legitimate Chinese foreign trade operator to make a valid foreign trade contract.[6]

However, pursuant to the Protocol, this regime must be radically changed. China must progressively liberalize the availability and scope of the right to trade, so that, within three years of accession, all enterprises in China shall have the right to trade in

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[3] Chinese leaders, including then President Jiang Zemin, Premier Zhu Rongji and President of the NPC Li Peng, have announced such opinion on many occasions before and after the accession to the WTO.

[4] Mark Williams & Zhong Jianhua, "The Capacity of Chinese Enterprises to Engage in Foreign Trade: Does Restriction Help or Hinder China's Trade Relations?" 8 Journal of Transnational Law and Policy 197 at 197.

[5] For more detailed discussion, see Chapter 2.

[6] See *the Interim Provisions of Foreign Trade Agency System*, art. 2. Despite its theoretical flaw, this practice is common in China's foreign trade.

all goods throughout the customs territory of China.[7] Besides this, according to the non-discrimination principle of the Protocol, with respect to the right to trade all foreign individuals and enterprises, including those not registered or without investment in China, shall be accorded treatment no less favorable than that accorded to enterprises in China.[8]

Complying with these provisions involves the imminent cessation of the foreign trade operation permit system, which is the current basis of Chinese foreign trade agency law. The onerous application and strict examination procedures for engaging in foreign trade that have been executed in China for half a century must be utterly replaced. Instead, a free trade system in accordance with the Protocol principles is required to have been set up by the end of 2004.[9]

The build-up of China's free trade system has three objectives.[10] Firstly, a right to transact foreign trade shall become a fundamental component of self-management for every enterprise in China. Therefore, all enterprises will become entitled to deal in foreign trade merely through the processing of registering, rather than by undergoing

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[7] See *Protocol on the Accession of the People's Republic of China to the WTO*, Part I, art.5 (1). However, liberalization of the right to trade in China does not extend to those goods listed in Annex 2A which continue to be subject to state trading in accordance with the Protocol.

[8] *Ibid*, Part I, art. 5(2). The Protocol provides that except as otherwise provided for in the Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favorable than that accorded to other individuals and enterprises in China. See *ibid*, Part I, art. 3.

[9] The WTO advocates five fundamental principles: most-favored nation, national treatment, transparency, free trade and fair competition. These principles are embodied in various WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. See online <www.wto.org/english/thewto_e/whatis_e.htm> (Date accessed: January 20, 2003).

[10] See Yang Shengming, ed., *Economic Globalization and Construction of Foreign Trade System* (Nanjing: Jiangsu People, 2000) at 53.

an administrative examination. However, individuals in China will not enjoy the same right to trade as foreign individuals.[11]

Secondly, all merchandise shall be freely circulated with the exception of merchandise specified in certain catalogues. China must reduce the tariff to a certain extent, even to zero, and must significantly control the non-tariff barriers.

Thirdly, the market shall have a fundamental and predominant role in foreign trade activities. In China's socialist market economy[12], the market, as an invisible hand, will allocate the resources and determine the economic activities. However, the Chinese government will supervise the state's economy through indirect mechanisms such as law, policy and economic measures, rather than through direct intervention as it once did.[13]

In the context of free trade in China, the implementation of a reformed Chinese foreign trade agency system presents a daunting challenge. The low proportion of enterprises nowadays using agency in China's foreign trade indicates that agency has not been widely accepted as an important trade mechanism by Chinese enterprises. Self-management remains predominant in China's foreign trade.[14] This situation has

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[11] According to the Protocol, the foreign individuals will enjoy the right to deal in foreign trade in China, while in contrast individuals from China will not. Such an allowance constitutes, in my view, a continued type of discrimination.

[12] However, there is another opinion that China's economy is not truly a market economy.

[13] Yang S., *supra* note 10 at 53.

[14] Many Chinese economists predict that self-management will still become the major means for China's foreign trade in the future, especially after the abolishment of China's foreign trade operation permit system. In fact, many Chinese enterprises chose to work their foreign trade operations by themselves as soon as they had acquired foreign trade operation permits. However, their lack of necessary foreign trading experience and personnel for foreign trade business resulted in blind

become even more obvious in recent years. In China, the foreign trading of large enterprises is virtually always carried out on their own account.[15] By contrast, many small or medium enterprises prefer to sell goods to foreign trade operators rather than entrust them as their agents. Even among those enterprises which entrust foreign trade operators to be their agents for foreign trade, many of them are reluctant to do so simply because they do not have foreign trade operation permits. The unpopularity of foreign trade agency has resulted in most Chinese foreign trade operators' working in a deficit.[16]

Against this backdrop, some are pessimistic about the future of agency after universal granting of the right to trade in China, and they forecast that agency will disappear from China's foreign trade one day. However, in my estimation, the utility of agency should become valued, especially in the international trade field. Experience in foreign countries tells us that the agency method fits the trading needs of medium and small-sized enterprises, which constitute the majority of Chinese foreign trade enterprises.[17] Professional agents can help these enterprises reduce the risks involved in international trade and enhance their competitiveness in the world market. One can anticipate that Chinese enterprises will come to realize that, in many

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construction and improper competition in this field. The experience is a lesson for China's future foreign trade reform.

[15] Normally, an inner department or a subordinate company is awarded with the foreign trade operation permit in large enterprises dealing themselves with their foreign trade business.

[16] Around 90% of Chinese foreign trade operators are in a deficit. See Academy of Chinese Foreign Economy and Trade University, "The Existing Problems in the Foreign Trade Agency System and Suggestions" (1997) 4 International Trade Matters 19.

[17] For statistics and analysis as to the high proportion of agency in the foreign trade area in major developed countries, see Chapter 2.

circumstances, doing business through an agent is an efficient means of which they should take advantage.

Another direct result of China's liberalization of the right to trade will be that, after being granted national treatment, experienced and wealthy foreign trade operators outside China will begin to flow into the country and compete with Chinese domestic foreign trade operators. Their entry into China's market will surely affect China's domestic foreign trade operators, especially those state-owned ones that are used to depending on favorable protection from the government.

How to survive intense and unprecedented competition that they have never encountered before will be a great challenge for Chinese foreign trade corporations.[18] They will need to improve their management standards and consolidate their competitive capabilities in readiness for the coming trade battles. In the meanwhile, these domestic operators should take advantage of their fortes, such as their local knowledge, their familiarity with Chinese culture and so on.

4.1.2 Uniformity

Although China purports to uphold the uniformity of its socialist legal system,[19] the Chinese legal system is still lacking coherence among its diverse legal sources, with different modes of legal efficacy enacted by various levels of authority.

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[18] Although China's foreign trade reform has been in process since late 1978, its experience in trade policy reform is called a case of gradualism, which means that China's outward trade strategy has been taking effect in a gradual way throughout the past two decades. See Kiichiro F. & Henri-Bernard S.L. et al, *Different Paths to A Market Economy: China and European Economies in Transition*, by Oliver B.(Paris: OECD, 1998), at 63. For the Chinese state-owned foreign trade operators, the change from a protective situation to equal competition with foreign companies, many of which will be multinational companies, is a drastic one that they have not experienced before.

[19] *The Constitution of the PRC*, art.5 (1). For legal sources of Chinese law, see Chapter 1.

Particular local governments and ministries proclaim rules and regulations regarding foreign trade matters, some of which are conflicting and ambiguous. Many rule-makers are concerned only for their own interests, which results in rules and regulations conflicting with laws.

However, pursuant to the Protocol, China must apply and administer all its laws, rules and regulations in a uniform manner.[20] To fulfill this requirement, since the accession, the Chinese government has begun examining and revising its current legal sources, and has made considerable progress.[21] Nonetheless, many barriers to unification of the Chinese legal system have arisen during the examination process. Particular departments and local governments, concerned for their own interests, are unenthusiastic about amending the rules that favor themselves, notwithstanding their being inconsistent with WTO requirements.

To unify the Chinese legal system, furthermore, means to unify the two distinct legal regimes dealing with two types of civil juristic acts: domestic and foreign-related.[22] The divergence of legal regimes existing in the Chinese legal system stems

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[20] By it, China should apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights or the control of foreign exchange. See *Protocol on the Accession of the People's Republic of China to the WTO*, Part. I, art. 2 (A) (2).

[21] In only one year following the accession to the WTO, China has amended 14 laws and 37 administrative laws, abolished 12 administrative rules, repealed 34 administrative notices by the State Council, and enacted or revised more than 1000 departmental regulations. The Supreme Court repealed 20 judicial interpretations. The provinces, autonomous regions and municipalities directly under the Central Government have examined over two million local legal rules, regulations and other policy notices in compliance with the uniformity principle. See "China Quickens Its Step to Examine Departmental Rules and Judicial interpretations", online <http://www.urumqi.gov.cn/urumqi/wto/zc06.html> (Date accessed: January 20, 2003).

[22] For analysis of the bifurcated nature of Chinese law, see Chapter 3.

from the influence of the country's former "close door" policy, which led to the separation of the domestic market from the outside world. Foreign-related laws were primitive in early socialist China in contrast with the laws dealing with domestic relations. Although this situation has been improved through two decades of legal development, foreign-related laws are still unsystematic and segmented.

The bifurcated nature of legislation, sharply criticized by scholars,[23] is also an important issue in Chinese foreign trade agency law where the different legal sources are expected to merge over time under the impact of the WTO requirements. For instance, IPFTAS and FTL merely deal with foreign trade relationships. The authority of agency and formality of agency contract provided in these two legal sources are significantly different from the ones in GPCL and the Contract Law.[24] The uniformity requirement in the Protocol calls for the consolidation of these rules among different legal sources.

4.1.3 Transparency

Transparency is one of the major goals of China's legal reconstruction under the requirements of the Protocol. In ancient China, law was always considered a tool exclusively used for the use of rulers to rule the ruled. Even in the early 1980s, law and legal matters were still treated as "internal working procedures", and restricted to

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[23] See Feng Datong, *International Trade Law* (Beijing: Beijing University, 1995) at 281. Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University, 2002) at 497.

[24] See Chapter 3, ss.3.3.1, 3.3.2.

a limited number of government officials and legal academics.[25] The public was largely excluded from the state's law-making and implementation procedures.

In the foreign trade area, MOFERT (later as "MOFTEC", now incorporated into "the Commercial Ministry") has administered China's foreign trade by so-called "internal documents" for several decades. The public is not aware of many of these documents, though they are literally legally binding in practice. Moreover, the CCP is not restricted to direction of the nation's political realm, but also intervenes in the legal regime. In many cases, the Party does not follow the legally prescribed procedures, but rather makes law serve its policy purposes.[26] The leadership of the CCP is called another unseen hand, comparable to the invisible hand of the marketplace.

This situation leaves the transparency of the Chinese legal system at a rather low level, and leads to a correspondingly high arbitrariness in legal practice. In recent years, the level of transparency of Chinese law has progressively improved, abetted by measures taken by the Chinese government.[27] However, transparency still lags behind economic development and hinders the further improvement of China's legal

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[25] Yuwen Li & Jan-Michiel Otto, "Central and Local Law-Making", from Eduard B. Vermeer & Ingrid d'Hooghe, ed., *China's Legal Reforms and Their Political Limits* (Richmond: Curzon, 2002) at 26.

[26] *Ibid*, at 27.

[27] As a good example, on September 1, 2002, MOFTEC proclaimed that all the administrative regulations, once they have been announced, must be published on *the Statement of China's Foreign Economic Trade*. See *the Regulation of the Draft of Laws and Administrative Rules and the Enactment of Administrative Regulations*, by MOFTEC. Online <www.moftec.gov.cn/article/200212/20021200059867_1.xml> (Date accessed: January 20, 2003) As well, the Chinese government has begun to encourage the public attend juristic activities, such as legal reviews and supervisions, etc. See *ibid*, at 26.

system. For instance, in the foreign trade area, access to Chinese law by the public is not as unrestricted as the WTO Agreement requires.[28]

In line with the Protocol, and as one of the most important requirements, China must undertake a series of measures to achieve transparency. Since the accession to the WTO, the Chinese government has begun to undertake to fulfill these obligations, in order to create a secure, predictable and encouraging environment for foreign trade and investment in China.

Transparency must also be a guiding principle for the future reform of Chinese foreign trade agency law. This requires that the legislating, implementing and enforcing of Chinese foreign trade agency law be transparent to the public. The published reporting of all legal sources concerning China's foreign trade agency should be put into effect, and the results made available to the world.

4.2 International Sources of Agency Law

As mentioned above, in light of China's convergence with the world market, the Chinese legislature was prompted to study diverse foreign laws and to incorporate multiple concepts of agency from both civil and common law systems into Chinese foreign trade agency law. However, these distinct concepts of agency being

[28] Currently, there is no such a system to publicize the effective Chinese laws, regulations or other legal sources, which hinders the transparency of Chinese legal system and is criticized by domestic and foreign legal scholars. As China has promised, in accordance with *Protocol on the Accession of the PRC to the WTO*, Part I, art.2 (C), subsection 2, she will "establish or designate an official journal dedicated to the publication of all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange and, after publication of its laws, regulations or other measures in such journal, shall provide a reasonable period for comment to the appropriate authorities before such measures are implemented, except for those laws, regulations and other measures involving national security, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement. Furthermore, China shall publish this journal on a regular basis and make copies of all issues of this journal readily available to individuals and enterprises."

incompatible with each other have resulted in many conflicts in the resultant legal regime. To remedy this problem, it would be helpful to survey such related international rules on agency, as might, to some extent, provide a model for a reformed Chinese foreign trade agency law.

4.2.1 Introduction to the International Conventions on Agency

Already in 1956 at the Eighth Session of the Hague Conference, [29] distinct differences regarding laws of agency were appreciated. There was pressure to unify them, first in the area of the international sale of goods.[30] To survey the results to date, we must look back to two major international conventions on agency. One is the Convention on the Law Applicable to Agency (hereinafter "Hague Convention"), which was formally concluded at the Hague Conference on March 14th, 1978, and entered into force for its four signatory States, France, Argentina, Portugal and the United Kingdom in 1992.[31]

To allow for its common application to both common and civil law systems, the Hague Convention adopts a definition of agency broad enough to accommodate all types of agency, including direct representation, indirect representation, undisclosed

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[29] The Hague Conference was founded by the Statute of the Hague Conference on Private International Law, which came into force on July 15, 1955. Its purpose is to work for the progressive unification of the rules of private international law. At present, there are 62 member States of the Hague Conference, including the U.K, U.S., Canada, China, Italy, Germany, Australia and France etc. See online <http://www.hcch.net> (Date accessed: November 5, 2002).

[30] H.L.E.Verhagen, *Agency in Private International Law* (Hague: Martinus Nijhoff, 1995) at 126.

[31] See online <http://hcch.net/e/conventions/menu27e.html> (Date accessed: November 5, 2002).

agency and brokerage.[32] The Hague Convention provides a set of rules on which law governs the formation and validity of agency, obligation of parties, conditions of performance, and so on.[33] The Hague Convention is open for signature by the member States of the Hague Conference and other States as well.[34]

The other international convention on agency is the Convention on Agency in the International Sale of Goods (hereinafter "Convention of Geneva"). Its conclusion by the International Institute for the Unification of Private Law (hereinafter "UNIDROIT") came in Geneva in February 1983. To date, six States have signed the Convention of Geneva, two States have ratified it, and other countries have acceded to it.[35]

In its Preamble, the Convention of Geneva provides that it aims to remove legal barriers in international trade and promote international trade by the adoption of uniform rules to govern agency in the international sale of goods.[36]

In contrast to the Hague Convention which is primarily composed of rules of conflict of law, the Convention of Geneva contains a number of substantive rules with regard to agency in international trade. It does not adopt the rules of representation

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[32] I.G.F.Karsten, "Explanatory Report of the Hague Convention on the Law Applicable to Agency of 14 March" at 14. See online <ftp://ftp.hcch.net/doc/exp127.pdf> (Date accessed: November 2, 2002).

[33] Chapter II of the Hague Conventions deals with the conflict law, see *ibid.*

[34] *Convention on the Law Applicable to Agency*, art.23, 24.

[35] The six States are Chile, Holy See, Morocco, Switzerland, Italy and France. Among them, Italy and France have ratified the Convention. In addition, South Africa, Mexico and Netherlands have acceded to the Convention of Geneva. See online <http://www.unidroit.org/english/implement/i-83.htm> (Date accessed: February 7, 2003).

[36] *Convention on Agency in the International Sale of Goods*, see online <http://www.unidroit.org/english/conventions/c-ag.htm> (Date accessed: November 4, 2002).

provided in civil law systems. Neither does it completely adhere to the concept of agency in common law. It provides that where the third party knew or ought to have known the agent was acting as an agent, no matter whether the agent acts in his name or in his principal's name, the acts of the agent shall directly bind the principal and the third party to each other.[37] However, if the third party neither knows nor ought to have known that the agent is acting as agent, or if it follows from the circumstances of the case that the agent undertakes to bind himself only, then the acts of the agent shall bind only the agent and third party.[38]

According to the definition of agency given in the Convention of Geneva, the agent is allowed to either act in his name or the principal's name, which essentially differs from the concept of representation in the civil law of agency. Nonetheless, the Convention of Geneva stipulates that in the case of an undisclosed principal, the third party should have known or ought to have known the agency relationship. Otherwise, the act done by the agent is not binding between the principal and the third party. This rule differs from the doctrine of undisclosed principal in the common law of agency.[39] Therefore, the Convention of Geneva adopts a unique definition of agency, seeking to bridge the gap between representation of civil law and agency of common law.

Pursuant to the Convention of Geneva, in the situation of an undisclosed principal, if the agent fails to fulfill or is not in a position to fulfill his obligations to the third

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[37] *Ibid*, art.12.

[38] *Ibid*, art.13(1). This is a distinctive provision from the definition of agency in the common law systems.

[39] For the doctrine of undisclosed principal in common law systems, see Chapter 3, ss. 3.1.2.

party due to the principal's failure of performance, the agent shall communicate the name of the principal to the third party.[40] The third party may then exercise against the principal the rights that the third party has against the agent, subject to any defences that the agent may set up against the third party and that the principal may set up against the agent.[41] The principal may also exercise against the third party the rights acquired on the principal's behalf by the agent, if the agent for any reason fails to fulfill his obligations to the principal.[42] However, if it appears from the circumstances of the case that the third party, had he known the principal's identity, would not have entered into the contract, the principal may not exercise the rights against the third party.[43] Therefore, the rules in the Convention of Geneva are, although not identically put, analogous to the law of agency in common law.

Besides the provisions on the agent's disclosure of his principal and the third party's right of election, the Convention of Geneva also includes other clauses on important issues of agency. It provides that the authorization, ratification and termination of authority of agency are not subject to any requirement as to form.[44] Moreover, it gives detailed rules with respect to ratification, upon which the act done by the agent without authority or outside the scope of his authority produces the same

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[40] *Ibid*, art.13(4).

[41] *Ibid*, art.13(2)(b).

[42] *Ibid*, art.13(2)(a).

[43] *Ibid*, art.13(6).

[44] The only exception to the free option of formality is that of the Contracting State where the principal or agent has his legislation requiring it in writing. See *ibid*, art. 10, 11, 27.

effects as if it had initially been carried out with authority.[45] These rules are enlightening for the further reform of Chinese foreign trade agency law.

4.2.2 Ratification of the International Conventions on Agency

Since the implementation of the "open door" policy in the late 1970s, the Chinese government has aspired to see China play an increasingly active role in the world market. However, integration with the world also means complying with the rules that are commonly accepted around the world.[46]

Chinese foreign trade agency law, as considered above, contains many incompatibilities in concepts of agency arising from the two civil and common law systems. In fact, these conflicts have drawn the attention of international legal authorities, who have endeavored to unify them through international conventions. Chinese legal scholars have recognized the importance of these international conventions and some have suggested that China should ratify the Convention of Geneva.[47] The hope is that, the ratification of the international convention would prompt the Chinese legislature to speed up improvements to Chinese foreign trade

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[45] See *ibid*, art.15 (1) - (8).

[46] International customary law and international conventions provide numerous rules accepted worldwide by different States. Globalization, accelerated by international economic growth, has become an overwhelming tendency not only in the economic sense, but also in the political and legal systems and institutions over the world. Establishment of a "world law" has even been called upon in the West, with the purpose of diminishing such legal barriers and differences as arise from international business transactions. Advocates of world law believe that clear and consistent general principles of law, once established in the world, would promote international trade and advance the general standard of living. See Konrad Zweigert & Hein, Kotz, *Introduction to Comparative Law*, 3rd ed. (New York: Oxford, 1998) at 3. However, opposing to it, another opposing opinion that doubts the possibility of establishing global unified ideologies. See Werner F. Menski, *Comparative Law in A Global Context* (London: Platinium, 2000) at 2-3.

[47] See Chen Lihu, "A Rustic Opinion of Foreign Trade Agency System of China" (2000) 2 Suzhou University Journal 64 at 67.

agency law. It is also argued that ratification would make it easier for Chinese courts to solve disputes concerning international trade through agency.[48]

International conventions, once ratified by the Chinese government, would constitute an important source for the Chinese legal system.[49] Furthermore, they would take precedence over domestic laws should conflicts arise between them.[50] However, the Chinese Constitution and laws are silent with respect to the implementation of international conventions in China,[51] and as a result, practice in this regard is inconsistent and confusing.[52] However, the full weight of China's social, economic, cultural and political features will continue to exert their considerable effects upon legal convergence between current domestic law and international conventions. Furthermore, the two international conventions, as introduced above, have not been widely acceded to or ratified in the world, which seriously confines their function and influence.

The Chinese government should seriously contemplate the ratification of the conventions on agency, evaluating both the advantages and disadvantages of doing so. If China ratifies these conventions, they will constitute an important part of Chinese

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[48] *Ibid.*

[49] See Chapter 1, ss. 1.3.2.

[50] *The General Principles of Civil Law of the PRC*, art. 142 (2).

[51] In international law, there are usually two approaches to implementing the international conventions within a State's national legal system. One is transformation and the other is adoption. How implementation of the international conventions proceeds depends on the provisions in the State's law. See Hugh M. Kindred et al., eds., *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed.(Toronto: Emond Montgomery, 1993) at 168.

[52] See Qingjiang Kong, "Enforcement of WTO Agreements in China – Illusion or Reality?" (2001) Vol. 35, Journal of World Trade 1181 at 1207.

foreign trade agency law. In readiness, rules in domestic laws that are inconsistent with the conventions would be abolished or amended. However, even without the Chinese government's current ratification of the international conventions on agency, such international legal sources provide precedents that are helpful for the prospective reform of Chinese foreign trade agency law, such as their model definition of agency, ratification and formality of agency and so on.

4.3 Prospective Reforms of Chinese Foreign Trade Agency Law

Recently, the CCP announced that in step with the development of China's socialist market economy, overall improvement of society, and the newest challenge of accession to the WTO, China would speed up the work of legislation and enhance its quality.[53] It is expected that by 2010 China will have established "a socialist legal system with Chinese characteristics".[54] Chinese foreign trade agency law, as an essential part of Chinese law, should become an immediate focus of reform.

The preceding analysis of Chinese foreign trade agency law has presented a critical examination of this legal regime and pointed out many problems in current law. It will form basis of the proposed reforms to Chinese foreign trade agency law to follow. The WTO requirements embodied in the Protocol, that is, universal grant of right to trade, uniformity of Chinese law, and transparency, are three fundamental principles governing the reform of Chinese foreign trade agency law. In addition, the rules of international conventions on agency surveyed above are valuable sources for

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[53] Jiang Zemin, "Report on the Sixteenth CCP' Central Committee", *People's Daily*, overseas ed (November 18, 2002) at 2.

[54] *Ibid.*

models to study when launching reforms intended to meet foreign and international expectations.[55]

4.3.1 Reforms of Free Foreign Trade in China

Required by the Protocol, free trade is one of the major goals of China's foreign trade reform in the coming two years. Current institutions and regulations inconsistent with the free trade principle are to be repudiated or replaced. The first such action is the looming dismantling of the foreign trade operation permit system, the cornerstone of both China's foreign trade agency system and of Chinese foreign trade agency law.[56] To replace the arduous examination and approval process currently in effect with a simple registration system for a foreign trade operation permit, Chinese foreign trade agency law would need to work such potentially radical adjustments as the following.

Firstly, regulations that put additional demands on the qualification of foreign trade operators would need to be eliminated. China's foreign trade should be made uniform with domestic trade in every respect, including the granting procedure for qualification of trade operators. Thus, FTL must be revised fundamentally. Most of the provisions of Chapter Two of FTL, which specify the requirements for foreign trade operators, would need to be abolished. Domestic enterprises and foreign enterprises and individuals would be granted the right to engage in foreign trade in China without limitation. However, one provision of Chapter Two should be maintained, that is, the foreign trade operators only cover the actions of legal entities

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[55] Jan Michiel Otto, ed., *Law-Making in the PRC* (Hague: Kluwer Law, 2000) at 69.

[56] For an introduction to the Chinese foreign trade operation permit system, see Chapter 2, ss.2.2.1.

and other organizations.[57] This seems a necessary proviso, as Chinese natural persons are not, and will not be in the near future, allowed to engage in foreign trade, although they are free to do business domestically.[58]

Secondly, after the dismantling of the foreign trade operation permit system, there should be no distinction between enterprises with foreign trade operation permits and those without. Therefore, related provisions distinguishing such enterprises as can be found currently in the IPFTAS and FTL,[59] should be abolished as well.

Thirdly, it would be necessary to explicitly stipulate in GPCL, the general civil law of China, that the right to deal in foreign trade is a component of Chinese enterprises, and foreign natural persons and enterprises doing business in China. This measure, in my view, will help to consolidate the free trade principle into Chinese foreign trade agency law.

4.3.2 Reforms to the Definition and Classification of Foreign Trade Agency

In light of that feature which was highlighted in the critical examination of Chinese foreign trade agency law, and which could be characterized as an adulteration of legal concepts transplanted and appropriated from other law systems, resolving the conflicting definitions of agency is fundamental to the reform of Chinese foreign trade agency law. The definition of agency stipulated in GPCL is identical to direct representation in civil law systems, whilst IPFTAS adopts indirect

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[57] *Foreign Trade Law of the PRC*, art. 8.

[58] See note 11. It is expected that in the future, natural persons will obtain the right to transact foreign trade, as in Western or other countries.

[59] Such provisions include art.1, 2 of the IPFTAS, and art.13 of FTL.

representation as its definition. Opposing them, the new Contract Law lays out the concept of agency as derived from common law systems.

To harmonize these incompatible definitions, the Chinese legislature must either forge a new definition of foreign trade agency or select one of the existing definitions while amending the others. Direct representation, such as is provided for in GPCL, and which requires the agent to act in the principal's name, is too narrow and unduly restricts the application of agency. Even in civil law countries, where direct representation originated, it is generally accepted today that the notion of acting in the principal's name should be understood in a wider sense, i.e. it is not necessary for the agent to be expressly acting in the name of the principal. Instead, it is sufficient, when the circumstances indicate, that the agent acts in his capacity as representative.[60]

Likewise, indirect representation is rejected for its rigidity of application in commercial circumstances.[61] For instance, since the internal aspect of agency is not reflected in the external relationship, the indirect representative has to account for the transaction made for the principal's interests. In return for the heavy risks, he will charge the principal a greater remuneration. In addition, the indirect representative makes contracts with third parties in his own name, which sometimes may not comply with the principal's requirements.[62]

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[60] This principle has been adopted in the German law and French law. See *German Civil Code*, art. 164 (1). *French Civil Code*, art. 1984.

[61] See S.J.Stoljar, *The Law of Agency* (London: Sweet & Maxwell, 1961) at 14. F.M.B. Reynolds, ed., *Bowstead on Agency*, 15th ed.(London: Sweet & Maxwell, 1985) at 15.

[62] These are two typical examples of the disadvantages of indirect representation. As Stoljar said, "...a law confined to indirect agents would fall far short of several needs: it could not cope with the many credit transactions which require a direct link between P and T, nor could it cope with the purely

Taking the sustainability of the legal regime into consideration, in my view the definition adopted in the Contract Law is most acceptable, that is, agency should exist when a person performs civil juristic acts on another party's behalf so as to affect his relations with the third party, regardless of whether the agent acts in his name or in the principal's name.[63] This definition essentially complies with the concept of agency provided in the Convention of Geneva.[64] Nonetheless, there is a slight difference between these two definitions. In the Contract Law, it stipulates that if the third party was aware of the agency relationship between the agent and the principal, the contract made by the agent in his own name binds the third party and the principal. By contrast, the Convention extends the application of agency further, such that the contract is binding if the third party has known or even *ought to have known* of the agency relationship when he enters into a contract. Since the phrase "ought to have known" is considered subjective and may cause uncertainty in its application, some Chinese scholars think it inappropriate to introduce this phrase into Chinese law.[65] However, in my view, Chinese foreign trade agency law should include this rule to strengthen the parties' cautiousness throughout the transaction.[66]

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organizational problems that are created by the size of the principal's business or by the number of the principals involved." See S.J.Stoljar, *ibid.*

[63] Although the Contract Law gives no concrete provision accepting the agent who acts in his own name on the principal's behalf, there are provisions in the Law that give legal binding effect to such an agent. See *the Contract Law of the PRC*, art. 396, 402, 403.

[64] See *Convention on the Law Applicable to Agency* (Hague, 1978), art.1. *Convention on Agency in the International Sale of Goods* (Geneva, 1983), art.1 (4).

[65] See Chen Jiang, "The Improvement and Drawbacks of China's Foreign Trade Agency after the New Contract Law Put into Effect" (2000) 3 International Trade Matters 62 at 64.

[66] *Ibid.*

When foreign trade operation permits are universally obtainable in China, there will be no separation of enterprises with or without permits. There will no longer exist three forms of agency in China's foreign trade practice.[67] Instead, there will be a simple distinction between a foreign trade agent who acts in his own name, and one who acts in his principal's name. Provisions related to the classification of agency, to be found in IPFTAS mainly, would have to be changed correspondingly.[68]

Definition-related conflicts between classifications of agency would be another matter for remedy in Chinese foreign trade agency law. GPCL and IPFTAS implement direct and indirect representation, while the Contract Law employs the common law's mode of classification. In keeping with the uniform definition of agency proposed above, this latter mode of classification is preferable for Chinese law for the following reasons.

Firstly, the new Chinese Contract Law has already partly adopted such a classification through its provisions for unnamed and undisclosed principals.[69] Secondly, the experience of civil law shows that representation does lack economic flexibility when dealing with credit transactions. By contrast, agency in common law

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[67] The three kinds of agency regulated by Chinese foreign trade law are: first, a foreign trade operator acts in his name for an enterprise with a foreign trade operation permit; second, a foreign trade operator acts in his name for an enterprise without a permit; third, a foreign trade operator acts for an enterprise with a permit in the latter's name. See Chapter 2.

[68] In IPFTAS, article 2 on the application of enterprises without a foreign trade operation permit should be deleted. Also, Article 1's delimiting title "enterprises with permit" would need to be altered.

[69] *The Contract Law of the PRC*, art. 402, 403.

systems benefits by being more simple.[70] Lastly, the international convention on agency also has adopted the mode of classification of agency developed within common law systems.[71] For the sake of compatibility with international practice, Chinese foreign trade agency law should consolidate its classification of agency by introducing categories of the unnamed and undisclosed principals into GPCL and IPFTAS.

4.3.3 Reforms to Rights and Obligations of Foreign Trade Agency

Drastic amendments to the definition and classification of agency in Chinese foreign trade agency law will lead to fundamental changes in the rights and obligations of the participants in foreign trade agency. After the adoption of the concept of agency provided for in the Contract Law, clauses on rights and obligations in other legal sources that are inconsistent with this definition should be amended.

In GPCL, the agent does not acquire any rights or duties from the contract he makes in the principal's name.[72] According to the unified definition of agency, this condition should further apply to the situation where the agent acts in his own name on behalf of his principal. The limitation of such extension is already set in the new Contract Law, except where there is conclusive evidence establishing that the contract is only binding upon the agent and such third party, the contract made by the agent is directly binding upon the principal and third party.[73]

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[70] *Bowstead on Agency*, *supra* note 61, at 314.

[71] *Convention on Agency in the International Sale of Goods* (Geneva), art. 2(2), 12, 13.

[72] J.Guyenot, *The French Law of Agency and Distributorship Agreements* (London: Oyez, 1977) at 10.

[73] *The Contract Law of the PRC*, article 402. However, this provision needs further interpretation.

In IPFTAS, unless he assigns the contractual rights and duties to the principal, the agent is personally liable and entitled under the contract made with the third party even though the third party is aware of the existence of his principal.[74] These rules in IPFTAS assume the agent as a party to the contract made with the third party, disregarding the principal whose interest is closely involved with the contract.[75] Consequently, the agent, under IPFTAS, needs to undertake all responsibilities in return for his limited remuneration. This unreasonable allocation of rights and obligations between the agent and the principal has been intensely criticized in Chinese foreign trade agency practice.[76] On the other hand, the principal is under all circumstances blocked from dealing with the third party as his counterpart. These legal consequences are contrary to the definition of agency in the Contract Law. Therefore, IPFTAS should be changed essentially. It should adopt, as the Contract Law now does, the principle of agency of common law, i.e., *qui facit per alium facit per se*.[77] The agent should be released from the contract, unless there is conclusive

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[74] See *the Interim Provisions of Foreign Trade Agency System*, art. 15. There is a similar provision in the civil law systems applying the indirect representation, for example, *Italian Civil Code*, art. 1705.

[75] See *the Interim Provisions of Foreign Trade Agency System*, art. 15.

[76] Criticism has it that the allocation of rights and obligations between the principal and agent is not reasonable in Chinese foreign trade agency law. Under IPFTAS and its Supplementary Explanation, the foreign trade agent is only entitled to a limited remuneration (as low as 3% of the total contractual amount or less), while he must bear all contractual risks and obligations to the third party.

[77] It means he who acts through another acts in person. Therefore, the principal, in the application of the Contract Law, is normally perceived as the party to the contract made between his agent and a third party. The principal enjoys the contractual rights and takes the contractual obligations as well. See *the Contract Law of the PRC*, art. 402.

evidence establishing that the contract is only binding upon the agent and the third party.

However, the vague phrase "conclusive evidence" in Chinese foreign trade agency law has contributed to uncertainty in practice. There are two ways to further quality this phrase. One is for the Chinese legislature to provide an interpretation as to the term's application. The other is through the Chinese courts. The courts may apply the term to concrete cases and their decisions will be instructive within their jurisdiction. In line with the uniformity of Chinese law as laid out in the Protocol, the first option is preferable, for legislation has a certain legal efficacy, while the decisions reached by courts are not binding in the Chinese legal system.

The Contract Law introduces the right of election for the third party and empowers the agent to disclose the agency under certain circumstance.[78] The allocation of rights and obligations under the Contract Law is fairer among the three parties of agency. Because new law has priority over old law, the legislature would need to amend the relevant terms in IPFTAS and GPCL for them to comply with the linked terms in the Contract Law.

However, even in the Contract Law, certain clauses remain unsatisfactory with respect to their detailing of the rights and obligations of agency parties. Currently to disclose agency is limited to be done by the agent. In my view, it should be extended to anyone who knows of the existence of agency, in order that the principal or the third party might claim rights against each other, even when the agent does not

[78] For more details on them, see Chapter 2, ss.2.3.

disclose the agency. The lines of division between agency, trading agency and brokerage should be made clearer to avoid confusion and overlapping application in legal practice.[79]

4.3.4 Other Issues of Chinese Foreign Trade Agency Law

After nearly twenty years of development, Chinese foreign trade law has been preliminarily established from patterned studies of both the civil and common law systems. However, many of its clauses remain defective and many issues remain unaddressed in current Chinese foreign trade agency law.

Firstly, GPCL provides that the entrusted agency may be created either in writing or orally.[80] However, IPFTAS and later FTL restrict the formation of agency to written contracts only, probably in the estimation that written contracts would help decrease the likelihood of disputes arising between principal and agent.[81] Accordingly, a contract involving foreign trade between a principal and agent, if not in writing, is invalidated.

This restrictive provision on the formality of agency contracts in IPFTAS and FTL seems regressive. It is an unreasonable extra burden for the development of foreign

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[79] I argue that neither the trading agency nor the brokerage contract defined in the Contract Law is not a type of agency contract. See Chapter 3. However, some of their characteristics are similar, even identical, to those of agency contract. For example, Contract Law of the PRC, art. 423 states that for matters on which there is no provision in the trading agency contract, then the provision on consignment contracts applies.

[80] *Ibid*, art. 65.

[81] See *the Interim Provisions of Foreign Trade Agency System*, art. 5. *Foreign Trade Law of the PRC*, art. 13.

trade agency and restrains the application of agency in China's foreign trade.[82] Furthermore, this stipulation is not consistent with the one governing the formality of agency for domestic trade. Therefore, the stringent terms in IPFTAS and FTL related to the formation of foreign trade agency should be abolished.

Under GPCL and the Contract Law, agency may be created through ratification by the principal.[83] When the principal assents to the act performed by an actor with no power of agency, beyond the scope of his power of agency, or after his power of agency has expired, he will bear civil liability for that action, as if the actor had operated it with the principal's authority. Unfortunately, GPCL and the Contract Law do not provide detailed rules regarding ratification of agency. By contrast, the common law systems and international conventions on agency have developed a set of rules for the ratification of agency. Some of these are indispensable while absent from Chinese foreign trade agency law, such as the effect of partial ratification and revocation of ratification.[84] Therefore, the Chinese legislature should study these rules on ratification with a view to addressing existing lacunae in China's legal system.

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[82] Agency made by written contract has certain advantages, such as helping to identify the existence of agency relationship and to figure out the rights and obligations in traceable letters. Thus, establishing an agency relation by written contract is worthy of encouragement. However, the provision affecting the formation of agency that is stipulated in the IPFTAS and FTL makes writing mandatory rather than optional. Therefore, it denies the existence of agency in other forms, such as by conduct or by spoken word. It is stringent and lacks flexibility in the commercial sense.

[83] *The General Principles of Civil Law of the PRC*, art. 66. *Contract Law of the PRC*, art.48.

[84] For the content of ratification of agency in the common law systems, see Chapter 3. *Convention on Agency in the International Sale of Goods*, art. 15.

IPFTAS and FTL, by not recognizing agency except within written contracts, effectively preclude the possibility of ratification of foreign trade agency. Recognition of the diverse forms of foreign trade agency proposed above implies that Chinese foreign trade agency law should amend the restrictive clauses in IPFTAS and FTL to acknowledge the notion of ratification as an important supplementary source of authority for agency.

4.3.5 Proposals for the Formulation of Chinese Foreign Trade Agency Law

Although there has been a multi-level structure established in Chinese foreign trade agency legal regime, containing a basic civil law, non-basic laws and administrative regulation,[85] nonetheless, these legal sources can hardly fulfill the requirements of China's foreign trade practice.

GPCL provides merely general and fundamental principles for civil acts, including agency. FTL, a specific law regulating Chinese foreign trade, is facing a substantial revision and expansion following the essential amendments of its current rules. The Contract Law is notable for its introduction into Chinese foreign trade agency law of such concepts as undisclosed agency from studies of common law systems and international conventions.[86] However, it is impossible to lay out detailed provisions

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[85] These legal sources are respectively the GPCL, FTL and Contract Law, and IPFTAS. As well, there are some local regulations related to the foreign trade agency system. For example, Guangxi Zhuangzu Autonomous Region has its own foreign trade agency regulation. However, since these local regulations are segmental and doubtful with respect to their legal efficacy, they are not included in this thesis as a national legal source of Chinese foreign trade agency law. Similar to this thesis, other studies of Chinese foreign trade agency law selected from the same range of legal sources in this area.

[86] See Fu Jinyan, "The Discussion on the Influence of Contract Law to China's Foreign Trade Agency System", (2000) No. 182, Vol. 5, Finance and Trade at 43. Chen Jiang, *supra* note 65 at 64. Chen Lihu, *supra* note 47 at 66.

on foreign trade agency in the Contract Law, which was proclaimed only recently and will not be amended for some time.

IPFTAS, thus, is considered the most practical legal source of Chinese foreign trade agency law and its seventeen provisions concerning the rights and obligations between foreign trade agent and principal are the most commonly cited rules in China's foreign trade agency practice.[87]

However, the inferior legal status of IPFTAS largely weakens its legal effect and application. IPFTAS, enacted by MOFERT as a temporary administrative regulation, should be subordinate to the Constitution, laws, and rules. Compared to these legal sources of Chinese law, an administrative regulation does not have a directly binding effect on courts. Instead, courts can merely take it as reference and decide on its adoption or not. In this sense, IPFTAS is more of a customary rule than a legislative rule. IPFTAS's inferior legal status has become the basis for much of the uncertainty among foreign trade operators.

Many Chinese legal scholars have realized this problem and called for a new detailed legal source with higher legal efficacy. Furthermore, they have suggested different ways to achieve this.[88] In my view, a practical way to solve this problem is for the State Council to enact an administrative rule on Chinese foreign trade agency

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[87] They are respectively Chapter 2 (art. 6- 14) on the rights and obligations of principal and Chapter 3 (art. 15 -22) on the rights and obligations of agent.

[88] Some suggested that the IPFTAS should be abolished. See Chen Lihu, *supra* note 47. Others proposed that IPFTAS should be amended and then submitted to the State Council. After its approval, it shall take effect in the name of Foreign Trade Agency Rule. See Lan Tian, "Discussion of the Legal Problems of Chinese Foreign Trade Agency" Vol. 17, No. 4 Journal of Xingtai Vocational and Technical College at 52.

system to replace IPFTAS. Because of the higher legal effect of an administrative rule, the confusion created by the uncertain application of IPFTAS would be abated. Moreover, the new administrative rule could exercise a unique function, which the laws cannot, by providing in a consistent manner detailed provisions on issues that remain unaddressed in current Chinese foreign trade agency law.[89]

[89] Silent issues in Chinese foreign trade agency law, see Chapter 3.

CHAPTER 5

CONCLUSION

Chinese law in its modern form has gone through a unique experience under the influence of both its domestic legal traditions and foreign laws. The edifying influence of Chinese legal traditions, notably Legalism and Confucianism, has imbued Chinese legal culture with specific characteristics that still actively affect China's legal development.

Foreign laws also have played an important recent role in the development of Chinese law. During the large-scale legal reconstruction launched in the era of radical economic reforms after 1978, China spared no pains to determine what might be suitably extracted from well-developed Western legal sources.[1] Both civil and common law systems were accepted by the Chinese government as valuable resources for China's unprecedented legal development.

In the 1990s, an influx of international trade and foreign investment into China impacted not only the country's economy, but also triggered or accelerated dramatic reforms in China's legal regime. To boost foreign trade and attract foreign capital, China's economic institutions and systems have been brought progressively into conformity with international practices, a re-orientation which is universally believed necessary to compete in a global context.[2]

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[1] Pitman B. Potter, *The Chinese Legal System* (London: Routledge, 2001) at 4.

[2] As to the positive effects of globalization to the domestic reforms in a state's economy, politics and legal system, see Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University, 2002) at 452-454.

Many problems have been created by the process, such as conflict between rule of law and the sovereignty of communist authority, strife between an ethos of innovation and ideological conservatism, and tension involving conflicting rules in these two systems.

Against this backdrop, this thesis has focused on Chinese foreign trade agency law for the following reasons. Firstly, Chinese foreign trade agency law plays an important role in China's foreign trade. In developed countries, agency is commonly utilized as a vehicle for engaging in foreign trade. In line with this widespread practice, since 1984 the Chinese government has encouraged the implementation of a foreign trade agency system, and its continued implementation remains an important policy for China's foreign trade reform. Therefore, Chinese foreign trade agency law constitutes an important part of China's foreign trade legal regime.

Secondly, Chinese foreign trade agency law is faced with an urgent need for reform. Compared to foreign trade agency practice in many developed countries, there is a very low percentage of agency in operation in China's foreign trade. One reason for this is that China's foreign trade agency system is restrictively, rather than voluntarily grounded, i.e. it is based on a foreign trade operation permit system. Upon China's accession to the WTO in 2001, one of the commitments China assumed is to liberalize the right to trade, which argues an end to its foreign trade operation permit system. In such a context, the extant rules of Chinese foreign trade agency law become subject to radical amendment.

Lastly, in contrast to the law of agency developed over centuries in the civil and common law systems, Chinese foreign trade agency law is relatively new and untried

in terms of both principles and concrete terms. Even compared to existing domestic trade laws, Chinese foreign trade agency law is conflicting and segmented. This leads to many disputes in actual practice and further hinders the development of foreign trade agency in China. Therefore, a thorough study of present Chinese foreign trade agency law seems an important preliminary to future improvement of China's foreign trade.

Taking as its basis the variety of Chinese foreign trade agency institutions and legal sources of foreign trade agency law, this thesis commences with a critical analysis of existing provisions in this prevailing legal regime.

Some of the issues the author has been concerned with, such as the differing definitions and conflicting classifications of agency provided for in GPCL, IPFTAS and the Contract Law, ultimately stem from the adoption, within different legal sources of Chinese foreign trade agency law, of alternative conceptions of agency from either civil or common law systems. At the time of its derivation, Chinese legislatures intended to introduce foreign-conceived concepts of agency into Chinese law for the broad purpose of convergence with international rules. However, they did not harmonize these different conceptions into a consistent whole, a cause for much subsequent confusion.

The rights and obligations of the parties to an agency agreement, one of the most important issues of agency law, are poorly determined in Chinese foreign trade agency law. Foreign trade operators criticize the onerous and unreasonable allocation of rights and obligations to principals and agents provided within Chinese foreign trade agency law. Moreover, vague boundaries set by legislation between agency and

other legal relations, i.e. consignment, trading agency and brokerage, make the application of law uncertain and confusing.

In light of the critical analysis of crucial issues for Chinese foreign trade agency law, the thesis proposes specific reforms. It first examines a series of obligations incumbent upon China upon its accession to the WTO, obligations which will significantly affect the reform of Chinese foreign trade agency law. The most important factor for prospective reform is the imminent liberalization of the Chinese foreign trade operation permit system. The stringent current foreign trade operation permit system, which inhibits most Chinese enterprises from directly dealing in international trade, is facing repeal by the end of 2004. Correspondingly, many rules in existing Chinese foreign trade agency law will have to be adjusted to conform to this radical change in operations.

The thesis takes up the matter of related international conventions on agency, undertaken to arrive at general principles for the development of agency worldwide. It advances a proposal that the Chinese government ratify these international conventions, and make them one further element of Chinese foreign trade agency law. Whether or not the proposal is undertaken, knowledge of rules on agency in international law enables a better understanding of problems in existing Chinese foreign trade agency law, and more importantly, it may offer model solutions for such problems.

In the final part of the thesis, the author proposes practical measures for effecting specific reforms to this legal regime. Consideration is given first to provisions that would remain inconsistent with the open granting of foreign trade operation permits,

and which therefore must be amended. The right to trade should be stipulated in Chinese law as an intrinsic right of Chinese and overseas enterprises and of foreign individuals. Although enterprises will be entitled to deal directly in foreign trade in China after the liberalization of the foreign trade operation permit system, the author believes that agency will remain an efficient means for foreign trade in light of its unique advantages. The author maintains that the foreign trade agency system will most likely proceed to develop and expand in China, rather than suffering a decline as some people have predicted.

Secondly, it is proposed that the definition of agency be unified among the various sources of Chinese foreign trade agency law. The concept of agency to be found in the Contract Law is what is recommended to be broadly and commonly adopted. This definition is derived from the common law of agency and is essentially consistent with the concept defined in the international conventions on agency. Then, the classification of foreign trade agency should be modified accordingly.

Thirdly, the thesis proposes the unification of regulations on the rights and obligations of parties in Chinese foreign trade agency law, in a manner consistent with the unified definition of agency.

Fourthly, the author advocates an elimination of the bifurcated provisions on the authority of agency and the formality of agency contracts. The stringent limitations affecting these issues in Chinese foreign trade agency law should be ended, in keeping with the more liberal rules in effect in other law systems, as well as in international law.

Lastly, the author contends that current legal sources of Chinese foreign trade agency law cannot meet the needs of real world practices. IPFTAS, the most concrete legal source in present Chinese foreign trade agency law, has a fatal shortcoming, which is that its inferior legal position results in its non-binding legal efficacy. Furthermore, key conceptions adopted in IPFTAS are not compatible with common rules of agency. Therefore, to effectively harmonize GPCL, FTL and the Contract Law, the author proposes there should be legislated a detailed administrative rule, possessed of greater legal efficacy, together with enacted provisions to consistently regulate this field.

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